SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 67

THE UNITED STATES OF AMERICA, PETITIONER

vs.

LOUIS BRUNO

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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A In the United States Circuit Court of Appeals

For the Third Circuit

No. 9055

UNITED STATES OF AMERICA, APPELLEE,

vs.

LOUIS BRUNO, APPELLANT

On Appeal from Judgment of the United States District Court for the District of New Jersey

Appendix to appellant's brief

Filed Nov. 17, 1945

1 In United States District Court, District of New Jersey

Docket entries

1944

Aug. 11.—Criminal Information for sale of wastepaper over ceiling, filed.

Aug. 11.—Order granting leave to file (Same Paper) (Fake).

Aug. 11.—Notice of Allocation, filed (Newark).

Sept. 5.—Plea—Not Guilty. (Waring) Bail continued. (Waring.)

1945

Jan. 24.—Trial moved before Hon. Thomas F. Meaney, Judge and Jury.

Jan. 24.—Ordered trial adjourned to Jan. 25, 1945, at 10:00 A. M.

Jan. 25.—Trial continued.

Jan. 25.—Ordered motions for a dismissal of the indictment; or in the alternative a directed verdict of not guilty as to each count, denied.

Jan. 25.—Verdict: Guilty as to counts 1, 2, 3, 4, and 5. Ordered bail continued—Ordered to report to probation office. Sentence date—February 16, 1945. (M)

Mar. 2.—Ordered motion in arrest of Judgment, denied. (M)

Mar. 2.—Sentence: Six months and a fine of $500.00 on Indictment. (M)

Mar. 2.—Ordered motion to fix bail pending appeal, granted. (M)

Mar. 2.—Ordered bail fixed at $1,500.00. (M)
2 Mar. 2.—Notice of Appeal, filed.
Mar. 2.—Judgment and Commitment, filed. (M)
Mar. 21.—Consent Order for Preparation of Record on Appeal, filed. (M) (6/15/45).

* * * * *

In United States District Court

Criminal information

INFORMATION

At the April 1944 term of the District Court of the United States of America for the District of New Jersey, held at Newark in said District, comes the United States of America, by Thorn Lord, United States Attorney, in and for said District, and, leave of the Court having first been obtained, informs the Court as follows:

FIRST COUNT

1. At all times hereinafter set forth, the defendant Louis Bruno was the agent, employee, and manager of Theresa Bruno, individually and trading under the name of T. Bruno Paper Stock, at Hackensack, New Jersey, engaged in business as a dealer acquiring wastepaper for the purpose of sale as wastepaper, and as such became and was subject and amenable to the provisions of Maximum Price Regulation 30, as amended, issued by the Office of Price Administration pursuant to the authority contained in the Emergency Price Control Act of 1942.

2. On or about March 31, 1944, at Hackensack, in Bergen County,
3 State and District of New Jersey, and within the jurisdiction of this Court, Louis Bruno did wilfully, knowingly, and unlawfully sell certain wastepaper, to wit: 25,979 pounds of old corrugated containers, to James Carrano Sons, Inc., the same being shipped, consigned, and delivered to Ohio Boxboard Company at Rittman, Ohio, via railroad freight car C. B. Q. 22160, at a price of $1.75 per hundredweight or $454.63, the same being a higher price than the maximum price of $1.15 per hundredweight or $298.25, as set forth in and permitted by Maximum Price Regulation No. 30 as issued by the Office of Price Administration, and as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

SECOND COUNT

And Thorn Lord, United States Attorney as aforesaid, further informs this Court,

1. He repeats the allegations of paragraph one of the first count.

2. That on or about March 31, 1944, at Hackensack, in Bergen County, State and District of New Jersey and within the jurisdiction of this Court, Louis Bruno did wilfully, knowingly, and unlawfully sell certain wastepaper, to wit: 24,040 pounds of corrugated wastepaper, to James Carrano Sons, Inc., the same being shipped, consigned, and delivered to Ohio Boxboard Company at Rittman, Ohio via railroad freight car P. A. 92203 at a price of $1.75 per hundredweight or $420.70, the same being a higher price than the maximum price of $1.15 per hundredweight or $276.46, as set forth in and permitted by Maximum Price Regulation
4 No. 30 as issued by the Office of Price Administration, and as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States:

THIRD COUNT

And Thorn Lord, United States Attorney as aforesaid, further informs this Court,

1. He repeats the allegations of paragraph one of the first count.

2. That on or about February 10, 1944, at Hackensack, in Bergen County, State and District of New Jersey and within the jurisdiction of this Court, Louis Bruno did wilfully, knowingly, and unlawfully sell certain wastepaper, to wit: 28,080 pounds of corrugated wastepaper, to James Carrano Sons, Inc., the same being shipped, consigned and delivered to Taggard Corporation, Watertown, New York via railroad freight car B. & O. 385622 at a price of $1.75 per hundred weight or $491.40, the same being a higher price that the maximum price of $1.15 per hundred weight or $322.98, as set forth in and permitted by Maximum Price Regulation No. 30 as issued by the Office of Price Administration, and as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

FOURTH COUNT

And Thorn Lord, United States Attorney as aforesaid, further informs this Court,

1. He repeats the allegations of paragraph one of the first count.

5 2. That on or about March 1, 1944, at Hackensack, in Bergen County, State and District of New Jersey and within the jurisdiction of this Court, Louis Bruno did wilfully, knowingly, and unlawfully sell certain wastepaper, to wit: 33,520 pounds of corrugated wastepaper, to James Carrano Sons, Inc., the same being shipped, consigned and delivered to Taggart Corporation, Watertown, New York, via railroad freight car S. P.

96472 at a price of $1.75 per hundred weight or $586.60, the same being a higher price than the maximum price of $1.15 per hundred weight or $385.48, as set forth in and permitted by Maximum Price Regulation No. 30 as issued by the Office of Price Administration, and as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

FIFTH COUNT

And Thorn Lord, United States Attorney as aforesaid, further informs this Court,

1. He repeats the allegations of paragraph one of the first count.

2. That on or about March 22, 1944, at Hackensack, in Bergen County, State and District of New Jersey and within the jurisdiction of this Court, Louis Bruno did wilfully, knowingly, and unlawfully sell certain wastepaper, to wit: 45,115 pounds of corrugated wastepaper, to James Carrano Sons, Inc., the same being shipped, consigned and delivered to Taggart Corporation, Watertown, New York, via railroad freight car K. C. S. 25293 at a price of $1.75 per hundred weight or $789.51, the same being
6 a higher price than the maximum price of $1.15 per hundred weight or $518.82, as set forth in and permitted by Maximum Price Regulation No. 30 as issued by the Office of Price Administration, and as amended, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

THORN LORD,
United States Attorney.
EDGAR H. ROSSBACH,
Assistant United States Attorney.

7 In United States District Court

Testimony

Appearances: For the United States of America: Edgar H. Rossbach, Esq., Assistant U. S. Attorney. For the Defendant: George R. Sommer, Esq.

Tried before Hon. Thomas F. Meaney, and a Jury, at the Federal Building, Newark, N. J., on Wednesday, January 24, 1945.

Mr. ROSSBACH. We move the trial of Information 2604c, United States of America vs. Louis Bruno.

The COURT. You may call the jury.

(A jury was impaneled.)

The COURT. The balance of the jurors will be excused until tomorrow morning at the usual time and they may leave now if they

so desire. I think we shall recess now until a quarter before two; you will have your lunch now and come back at quarter before two, at which time we will resume the trial.

(Noon recess.)

AFTERNOON SESSION

The COURT. Is the defendant here?

Mr. SOMMER. Yes, sir.

The COURT. Is the Government ready?

Mr. ROSSBACH. Yes, sir.

8 The COURT. Is the defense ready?

Mr. SOMMER. Yes, sir.

The COURT. Swear the jury.

(The jury was sworn.)

(Mr. Rossbach opened on behalf of the Government.)

Mr. ROSSBACH. With the Court's permission I will call Mr. Carrano.

JOSEPH V. CARRANO, called and sworn on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Q. Mr. Carrano, where do you live?—A. I live in Brooklyn.

Q. In what business are you engaged?—A. Waste paper business.

Q. Located where?—A. New York City.

Q. For how long a period of time have you been engaged in that business?—A. Thirty years.

Q. What particular phase of the waste paper business do you engage in?—A. We are what are known as wholesale dealers and brokers.

Q. What does that mean with relation to your activity in the trade?—A. That means we buy waste paper from other dealers and sell it to the consuming mills.

Q. Now, specifically directing your attention to the defendant in this case, Louise Bruno, did you or your company have any transactions in waste paper with him?—A. Yes, sir.

9 Q. And was that as you have described it with you in the capacity as dealer or broker, and he in the capacity as transferer to you of the waste paper?—A. Yes, sir.

Q. Do you have the records of your dealings with him with you?—A. I have some records; yes.

Q. Will you please refer to the date of March 31 in 1944. Will you tell us whether on that date you had a transaction with Bruno with relation to the purchase of waste paper?—A. Yes; we did.

Q. What did you negotiate for on that day with Bruno?—A. We purchased a carload of No. 1 assorted kraft, 35,310 pounds.

Q. Were you submitted an invoice by Bruno to cover that sale?—A. Yes, sir.

Q. I show you what purports to be a photostatic copy of an invoice and ask you whether you can identify that?—A. Yes, sir.

Q. What is it?—A. That is an invoice from T. Bruno Paper Stock Company to us.

Q. And what does it represent?—A. It represents the purchase of a carload of waste paper.

Q. The carload that you have just described?—A. Yes, sir.

Q. And as a result of this invoice and that particular transaction, did you make a payment to Bruno for that delivery?—A. Yes, sir.

Q. What was the amount that you paid him?—A. $635.59.

Q. The same amount shown on the invoice?—A. Yes, sir.

Mr. Rossbach. At this time I would like to offer in evidence the photostatic copy. I am suggesting this if your Honor please, so that the witness may take back his original copy.

The Court. All right.

(Aside to the witness:) What is that one thirty-five or one eighty-five?

The Witness. It is one seventy-five.

Mr. Sommer. No objection.

(Received and marked "Exhibit G-1.")

Q. Now, Mr. Carrano, referring you specifically to that particular shipment, to whom was that consigned?—A. Well, it was either consigned to Ohio Box Board or Taggart Corporation. I cannot tell exactly. Do you have anything——

Q. I show you what appears to be an invoice directed from your company?—A. That went to Ohio Box Board.

Q. And that applies to the same shipment which is represented by Exhibit G-1?—A. Yes, sir.

Mr. Rossbach. I ask that this be marked for identification.

(Marked "G-2" for identification.)

The Court. What is that price on that, $1.75?

The Witness. $1.75 per hundredweight.

Q. That is the equivalent of how much per ton?—A. $35 per ton.

Q. And now I show you an invoice from T. Bruno Paper Stock Company, addressed to James Carrano's Sons, and ask you whether you can further identify that?—A. Yes, sir.

Q. And what does that represent?—A. That is the same as the other instance, purchase of a carload of wastepaper of T. Bruno, shows the car number there, and the grade and the price.

Q. And the grade was what?—A. The grade was No. 1 Assorted Kraft.

11 Q. And the price $1.75 per hundredweight; right?—A. Yes, sir.

Q. Now, I then show you an invoice, or photostatic copy of invoice on your stationery and ask you whether that applies to the same shipment and discloses the consignee?—A. Yes, sir.

Q. And to whom was that consigned?—A. That was consigned to the Ohio Box Board at Rittman, Ohio.

Mr. ROSSBACH. I am offering invoice of T. Bruno Paper Stock Company to James Carrano's Sons.

Mr. SOMMER. No objection.

The COURT. It will be received and marked in evidence.

(Received and marked "Exhibit G-3.")

Mr. ROSSBACH. And at this time I ask that the exhibit which the witness had identified as his own invoice be marked for identification.

(Marked "G-4" for Identification.)

Q. Mr. Carrano, as a result of receiving the invoice which is identified now as Exhibit G-3 in evidence, did you make a payment for that particular delivery to Bruno?—A. Yes, sir.

Q. Will you tell us the amount you paid?—A. $461.16.

Q. And that was the exact amount represented and shown on the invoice?—A. On Bruno's invoice.

Q. Right. And that was based upon the Assorted Kraft at $1.75 per hundredweight?—A. Yes, sir.

Q. I show you another invoice on the paper of T. Bruno Paper Stock Company addressed to James Carrano's Sons, and ask you if you can further identify that?—A. Yes, sir.

Q. As being what?—A. That is the purchase of waste paper from T. Bruno showing #1 Assorted Kraft, total weight and contents.

12 Q. Do your records show to whom that was consigned?—A. I don't think the records show. I can show you copy of my invoice. Yes; that was consigned to Taggart Corporation.

Q. Where?—A. Deferiet, New York. Watertown, New York, is where the shipment was made.

Q. As a result of receiving this invoice from T. Bruno Paper Stock Company did you make payment?—A. Yes.

Q. Will you tell us the amount you actually paid.—A. $505.44.

Q. That is the amount shown on the invoice?—A. That is the amount of the invoice.

Q. $1.75 per hundredweight?—A. Yes, sir.

Mr. ROSSBACH. I offer this in evidence.

Mr. SOMMER. No objection.

(Received and marked "Exhibit G-5.")

Mr. ROSSBACH. And at the same time I ask that the invoice which

the witness identified as being his invoice to the Taggart Corporation be marked for identification.

(Marked "G-6" for Identification.)

Q. I show you a fourth invoice, Mr. Carrano, addressed to you, apparently from the T. Bruno Paper Stock Company, and ask whether you can further identify that?—A. Yes, sir.

Q. Tell us what it represents.—A. This invoice is from Bruno to us for carload #1 Assorted Kraft @ $1.75, total amount $603.36.

Q. And as a result of receiving that invoice, did you make payment?—A. Yes, sir.

Q. How much?—A. $603.36.

13 Q. The amount shown on it?—A. Yes, sir.

Mr. Rossbach. I offer it in evidence.

Mr. Sommer. No objection.

The Court. Mark it.

(Received and marked "Exhibit G-7.")

Q. And I show you a fifth invoice, Mr. Carrano, purporting to be a photostatic copy of an invoice addressed to you by T. Bruno Paper Stock Company, ask you whether you can further identify that?—A. Yes, sir.

Q. As being what?—A. As being invoice from Bruno to us for a carload of #1 Assorted Kraft.

Q. Amount?—A. $812.07.

Q. As a result of receiving that did you make payment?—A. Yes, sir.

Q. In what amount?—A. $812.07.

Q. And to whom was that consigned?—A. That was consigned to Taggart Corporation.

Q. Your answer is the same referring to that exhibit.—A. Yes.

Q. And this is your invoice to the Taggart Corporation?—A. Yes.

Mr. Rossbach. I offer this Bruno invoice in evidence.

Mr. Sommer. No objection.

(Received and marked "Exhibit G-8.")

Mr. Rossbach. And I ask that the Carrano invoice identified by the witness be marked for identification.

The Court. So marked.

(Marked "G-9" for Identification.)

14 Q. Now, Mr. Carrano, will you tell us, please, based upon your experience in the waste-paper business, what the difference is between assorted Kraft and corrugated waste paper, and with particular reference to the categories in which they fall under the Office of Price Administration regulations, if you know.—A. Well, the old corrugated papers such as used for containers, boxes, is called the old corrugated containers. It has a ceiling price of $23 per ton. The grade known as No. 1 Assorted

Kraft is any kind of kraft paper such as used in wrapping, wrapping papers, envelopes and bags—that class of paper.

Q. All right. Now, in your negotiation for the purchase of these particular grades of waste paper as indicated by these exhibits, with whom did you deal, as far as the Bruno Paper Stock Company was concerned?—A. The individual?

Q. Yes.—A. With Louis Bruno.

Q. That is, the defendant in this particular case?—A. Yes, sir.

Q. And you accepted the invoices directed to you by them or by him, did you, at their face value, and paid based upon it, did you not?—A. Yes, sir.

Q. At any time did you involve yourself in an inspection of the contents of any shipment?—A. No, sir.

Mr. ROSSBACH. Nothing further.

Cross-examination by Mr. SOMMER:

Q. Mr. Carrano, let's first get this question of the kraft straightened out. These corrugated boxes that you talk of are made from kraft, are they not?—A. Some of them are; yes, sir.

Q. And there are two pieces of kraft between which is placed a piece of corrugated kraft?—A. That's right.

Q. Did you give orders to Bruno for paper?—A. Yes, sir.

15 Q. And what were the terms of those orders?—A. I don't quite get you; what do you mean?

Q. Well, when you ordered paper from Bruno you ordered it upon certain terms, did you not?—A. Yes. We specify the grade we use, the price we are willing to pay and where he is to ship it and then we have other terms in connection with the purchase of waste paper.

Q. Now, in addition to specifications of the type of material, you also had a condition in the order that the order was subject to inspection at the mill as to class, quantity, and quality of merchandise?

Mr. ROSSBACH. I object.

Q. (Continuing). Was it not?

Mr. ROSSBACH. Unless the order itself is to be introduced in evidence—there has been the suggestion that there is a purchase order.

The COURT. How did you get these particular shipments?

The WITNESS. Well, we would, ordinarily, the way we transact——

The COURT. No; these, these.

The WITNESS. We would talk on the phone and make a purchase of a carload of paper and we would send an order out for the carload and instruct them where to ship it.

The COURT. How did you do that, in writing; send it out in writing?

The WITNESS. We usually confirmed it in writing; yes.

The COURT. Well, did you confirm these orders in writing?

The WITNESS. Yes, sir.

16 Q. And have you a copy of the orders that you sent out?—A. I have.

Q. Will you let us see those orders?—A. Want them all?

Q. Well, all pertaining to these; these are the orders that you gave to Bruno covering the shipments we are discussing here. Now, is that correct?—A. Those are duplicate orders.

Q. Duplicates of the orders.

Mr. SOMMER. I ask that these be marked for identification.

The COURT. Mark them for identification.

(Marked "D-1" for Identification.)

Q. Now, all of these orders, Mr. Carrano, are on a printed form; is that correct?—A. Yes, sir.

Q. And they all contain the same condition, do they not?—A. Yes, sir.

Q. That "The above merchandise is purchased subject to mill or consignee's report as to weight, quality, excess freight, etc."—A. Yes, sir.

Q. Now, did you receive orders from the mill for paper?—A. Yes, sir.

Q. And have you with you the orders that you received from the mill that cover the paper here involved?—A. I have with me just one order from one of the mills.

Q. Will you produce that order, sir?

(Paper is produced by the witness.)

Mr. SOMMER. I ask that this be marked for identification.

The COURT. Mark it for identification.

(Marked "D-2" for Identification.)

17 Q. The order which you received from the Taggart Corporation was on a printed form as well; is that correct?—A. Yes, sir.

Q. And contained the conditions of the order printed thereon?—A. Yes, sir.

Q. And your order from Taggart was upon the following conditions, was it not: "All materials will be subject to our inspection and approval, and if rejected, same will be held subject to your order and risk and at your expense," is that correct?—A. Yes, sir.

Q. And insofar as your dealings with the Ohio corporation, what were the terms upon which you dealt with them?—A. Well, their terms are practically the same, sold under their inspection and approval as to weight and quality and so forth.

Q. Now, is that the custom of the trade?—A. Yes, sir.

Q. And in shipping to a mill does it make any difference under what name the goods is invoiced?—A. Well, it doesn't make an

awful lot of difference, because they are all subject to final reports. The only difference there would be the amount of money that we have to lay out.

Q. Now, when the goods arrives at the mill is it inspected there?

Mr. ROSSBACH. I object to that unless this man is at the mill.

Q. Do you receive a report from the mill as to the inspection of the paper after it is received at the mill?—A. Yes, sir.

The COURT. Did you on these particular cases?

The WITNESS. I believe so, sir.

Q. And after you have received the report from the mill as to what was contained in the cars, what do you then do insofar as the dealer from whom you purchase the paper is concerned?—A. Well, we usually call him up first and tell him what the report contains and then be governed by what he says, whether he wants to leave the merchandise at the mill or whether he wants to take it away and ship it somewhere else.

Q. Now, in connection with this transaction did you receive reports from the mill?—A. I believe we did; yes.

Q. And after that was a debit memo sent to T. Bruno Paper Company?—A. I think so.

Q. I show you three debit memos and ask you to examine them and see whether they cover the paper that is covered by the invoices which have been offered in evidence?—A. Yes; they cover the cars in question.

Q. And are these debit memos issued by your company to the T. Bruno Stock Company?—A. Yes, sir.

Mr. SOMMER. I ask that these be marked for identification.

The COURT. They may be marked for identification.

(Marked "Exhibit D-3" for Identification.)

Q. Now, as a matter of fact, Mr. Carrano, as the result of the agreement that existed between you, T. Bruno Paper Stock Company, and the mills, when was the price that was to be paid for the paper to be finally determined?

Mr. ROSSBACH. I object to that on the ground that it does not make any difference because the price as testified to by the witness was paid upon the submission to him of an invoice by his immediate seller.

The COURT. What price do you mean, Mr. Sommer?

Mr. SOMMER. A final price to be paid for the paper.

The COURT. By this man?

Mr. SOMMER. Yes; by this man.

The COURT. He has testified that he paid it upon receipt of the invoice, was it?

The WITNESS. Yes, sir.

Mr. SOMMER. That is correct, but that wasn't the final price. He has testified that it was subject——

The COURT. Was there any other price?

The WITNESS. In waste paper it is all sold subject to the mill report. It usually takes four or five weeks. There is usually an adjustment.

The COURT. Was any adjustment made in these particular matters?

The WITNESS. Yes; he just showed me some debits that were issued on those shipments.

Q. Under your agreement, when was the final price he actually paid for this paper to be determined?—A. Well, we had no agreement to that effect, those terms—that is regular trade terms that we have and regular trade custom terms.

The COURT. As I understand it when you got the invoice you paid the amount set forth in the invoice?

The WITNESS. Yes, sir.

The COURT. Now, then, when the goods were shipped to the final consignee you received a report?

The WITNESS. Yes, sir.

The COURT. And upon receipt of that report you made certain credit adjustments?

The WITNESS. Yes, sir.

The COURT. Now, when were the credit adjustments made, on the dates set forth on those credit slips?

20 The WITNESS. Well, those are the dates that we charged back our customer. Now, the notice that we had from the consignee may be different, but the dates we charge him back, issue our debits to him are as shown on those reports.

Q. Now, as the result of this trade practice and as the result of the agreements that existed between you and Bruno, did you pay Bruno anything above the set ceiling price for this paper?—A. Well, when the final transaction was completed he didn't receive anything over the ceiling price.

Q. Now, in referring to the ceiling price as I understand it, it varies for the different types of paper; is that correct?—A. Yes, sir.

Q. And that ceiling price on corrugated kraft is $1.15 plus five cents for handling?—A. Yes, sir.

Q. Per hundredweight; so that the total price is $1.20?—A. Yes, sir.

Q. And the other papers vary in the same manner, is that correct?—A. Yes.

Redirect examination by Mr. ROSSBACH:

Q. Mr. Carrano, do you have with you the reports that you got from the mill in connection with these particular shipments?—A. Yes, I have.

Q. Do you have Taggart's?—A. No; Taggart's don't issue reports; they usually reported it later and asked us to send them a credit or a corrected invoice.

Q. Do you have any letters that you received from Taggart in connection with the three shipments that they got?—A. I didn't bring those with me.

Q. Do you have any recollection of having received them?—A. Yes; we did.

21 Q. With particular reference to the three shipments which are represented by the invoices that have already gone in evidence, is that right?—A. Yes, sir.

Q. And these two reports here are from the Ohio Box Board Company pertaining to the other two shipments represented by the other two invoices, are they not?—A. Yes, sir.

Q. And as a result of that you issued these debits to Bruno?—A. Yes, sir.

Q. Can you tell us whether the dates as stated on these debit memos represent the date upon which those memos were issued?—A. The date of these memos is the date that we made them up at our office.

Q. And then mailed them?—A. Well, we don't mail them, we usually forward them with the next check, so that he may have received those a week afterwards.

Q. So that August the 10th, 1944 for the one, April 13th, 1944 for the other and April the 13th, 1944 for the third, represent the date upon which they were made up at your office?—A. That's right, that is when the transaction is completed.

Q. Now, Mr. Carrano, here is an invoice from T. Bruno Paper Stock Company to you dated January the 13th, 1944. Tell us what that represents.—A. That is a carload of waste paper from T. Bruno to us #1 Assorted Kraft.

Q. And does that represent a transaction as a result of which you bought waste paper from Bruno?—A. Yes.

Q. And did you pay the price as stated thereon?—A. Yes, sir.

Q. And to whom was that consigned?

Mr. Sommer. Well, now, I object as being wholly immaterial, not being one of the shipments mentioned in this indictment.

22 The Court. What is the purpose, Mr. Rossbach?

Mr. Rossbach. If your Honor please, the primary purpose is to neutralize whatever effect the witnesses testimony was on cross examination to the extent of showing that it was not the practice as he described it, for these debit memos to be issued prior to the dates alleged in the information; that it was not the trade practice, nor did the dealer regard the inspection at the mill as a condition precedent to the sale.

The COURT. Well, as I understand, the basis of this charge is that this man sold at over-ceiling prices.

Mr. ROSSBACH. That's right.

The COURT. I don't care what the trade practice is. What we are trying to get at is whether or not he did sell at over-ceiling prices. I don't see how this is material.

Mr. ROSSBACH. Except insofar as it would apply to the cross-examination, plus the indicated effort on the part of Mr. Sommer to show this was nothing wilful, nothing intentional and to offer some transactions within this period will——

The COURT. Let us see if we can get at this. Just think now of what you are saying. You received an invoice from the defendant Bruno.

Mr. SOMMER. Received it from T. Bruno Paper Company.

The COURT. For some paper which you bought and which was shipped to how many different mills?

Mr. SOMMER. Two different mills.

The COURT. Two different mills. How many shipments?

Mr. SOMMER. Five.

23 The COURT. All of these shipments consisted of paper which you bought from Bruno and which were shipped to these two mills. You received invoices, that's right?

The WITNESS. Yes, sir.

The COURT. You paid the amount indicated on the invoice?

The WITNESS. Yes, sir.

The COURT. Then you received from the mills on arrival of the goods that you shipped, reports?

The WITNESS. Yes, sir.

The COURT. As to the weight and quality of the material received?

The WITNESS. Yes, sir.

The COURT. Right. Upon receipt of those, you sent credit slips to Bruno?

The WITNESS. Yes, sir.

The COURT. For differences in the merchandise received as a variation from the merchandise included in the invoice?

The WITNESS. Yes, sir.

The COURT. Was that whole transaction, so far as the payment and the shipment, the report and the giving of credit slip, carried out as that ordinarily would be carried out in the regular course of the trade?

The WITNESS. Yes, sir.

Mr. ROSSBACH. May I supplement that by one additional question?

The COURT. Yes.

By Mr. ROSSBACH:

Q. When you say that, Mr. Carrano, do you mean that previous to that, on shipments made by Bruno on your order or on your consignment to, we will say Taggart Corporation, they had been in the habit of sending the reports back by letter?—A. Yes; we have had reports.

Q. And those reports would contain the information to you that instead of assorted kraft, the shipment contained corrugated?—A. Sometimes; yes.

Q. And that as a result of that, you would issue these debits memos to Bruno?—A. That's right; to Bruno or whoever shipped the car for us.

Mr. ROSSBACH. If your Honor please, I don't want to say anything that is going to make a difference because of your Honor's subsequent ruling. I would ask that I be permitted to argue this out of the hearing of the jury.

The COURT. All right. The jury will be excused.

(The jury was excused.)

Mr. ROSSBACH. If the Court please, the information alleges five independent transactions. These debit memos which have been identified by this witness occurred all at times subsequent to any dates alleged in the information. We are prepared to show by other witnesses that when these shipments, or some of them, reached their point of destination they were inspected at the point of destination by an Office of Price Administration agent. It was then for the first time that any of these people who are involved in this transaction became aware of the interest of the Office of Price Administration in these various shipments. They now say that this was a static practice which was engaged in throughout; we are prepared to show by similar transactions within a space of two or two and a half months immediately prior to this, there were inspections made without the benefit of the Office of Price Administration agents. There was the same situation disclosed, corrugated, instead of assorted kraft at the mills, and yet in no instance was there ever a report issued by the mill or a debit memo issued by this witness to bring——

The COURT. Well, is it the contention that this man is lying on the stand? Because if it is and you can prove it, it will be a sorry day for somebody and that is why I have asked the question that I asked.

Mr. ROSSBACH. I think that in fairness to him, we should be permitted to——

The COURT. I am not going to permit you to contradict him because he is your witness. As far as I will permit you to go is to neutralize his testimony, which means that in effect he has not

testified at all and you are left without his testimony and you go into the case and prove it with the other witnesses that you have, but not with him, if you are going to neutralize his testimony.

Mr. ROSSBACH. No, sir; we cannot do that.

The COURT. Well, you cannot contradict it.

Mr. ROSSBACH. It is not that kind of a case, but we do say that we are permitted under the rules, to have him identify similar transactions between these same parties involving the same subject matter where the same pattern of activity was followed throughout.

The COURT. Can't you show that through somebody else?

Mr. ROSSBACH. No, sir; because he is the person who dealt with the defendant.

The COURT. Well, I don't think I will allow you to do it, Mr. Rossbach, because, in effect, you are trying to impugn your
26 own witness. He has testified flatly that that was the fact of the trade and was followed in this case. Now if you are going to show something else, you are trying to contradict your own witness through your examination.

Mr. ROSSBACH. All right, sir, I will wit'draw the offer at this time.

The COURT. But I am saying this to you, that if you are convinced that the witness is not telling the truth as he testified here, action may be taken.

Mr. ROSSBACH. May I take that up with your Honor later?

The COURT. Yes. All right, you may recall the jury.

(Proceedings resumed in the presence of the jury.)

Mr. ROSSBACH. At this time, if the Court please, I would like to offer in evidence the debit memo referred to by Mr. Sommer and identified by the witness.

The COURT. All right.

Mr. SOMMER. I have no objection to Mr. Rossbach offering in evidence everything I have had marked for identification.

Mr. ROSSBACH. Mark this in evidence.

(Received and marked "Exhibit G–10.")

Mr. ROSSBACH. Nothing further from this witness, if the Court please.

Re-cross-examination by Mr. SOMMER:

Q. Just one question, Mr. Carrano. When you sent these debit memos that were sent with the check covering the balance due up to that time, were they not for other transactions?—A. Yes, sir.

27 Q. And the amount was deducted from the checks that that you sent?—A. Yes, sir.

Q. To Bruno Paper Company?—A. That's right.

Q. That's all.

The COURT. In the orderly course of business, how long a time ordinarily elapsed between the receipt of the merchandise by the ultimate consignee and the establishment of the debit memo?

The WITNESS. Well, I would say in ordinary times it would take from two to three weeks to get in a report; but with conditions as they are today, it may take two or three weeks before the car gets out to the destination.

The COURT. I say, after the receipt of the shipment by the ultimate consignee.

The WITNESS. You are talking about the mill now?

The COURT. Yes.

The WITNESS. The mill might take from four to five weeks or from two to three weeks, depending on when he receives the car and unloads the car and the office staff is ready to send in a report. So I would say that would all take place between two and six weeks.

The COURT. After the receipt by the mill?

The WITNESS. Yes, sir.

The COURT. All right, step down. Next witness.

CHARLES M. FORMAN, called and sworn on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Q. Mr. Forman, you are employed by the Ohio Box Board Company of Rittman, Ohio?—A. Yes, sir.

28 Q. In what capacity?—A. Secretary and treasurer.

Q. Do you have charge and control of the records of the company as they relate to shipments received by it?—A. Yes.

Q. Will you refer please, to the records and tell us whether you received a shipment from James Carrano's Sons on car number CBQ 22160?—A. Yes, sir.

Q. On what date?—A. It was invoiced on March 31st.

Q. And do your records show upon what date payment was made based upon that invoice?—A. Payment was made on April 24, 1944.

Q. Is there a record contained in your official file which shows that the contents of the car was inspected?—A. Yes, sir.

Q. Do you know who made the inspection?—A. Our unloading superintendent.

Q. And who would that be?—A. Mr. Taylor.

Q. And do you have the report that was given in by him?—A. Yes, sir.

Q. Will you tell us what that report contained?

The COURT. What date?

The WITNESS. The date is April 8th when it was unloaded.

Q. And what was the date of payment?—A. April 24th.

Q. Now, as the result of that inspection or the report of inspection, what did you find as to the contents of that particular car? A. 2,605 pounds of mixed paper; 25,979 pounds of corrugated, and 6,735 pounds of kraft.

The COURT. Of what?

The WITNESS. Of kraft; assorted kraft.

Q. Now, was there any kraft contained in that carload other than the 6,735?—A. No.

29 Q. Now, as a result of that inspection and based upon the report of it, what, if anything, did you or your company do with respect to payment?—A. We paid for what the car received according to our inspection.

Q. You made a report of that inspection to Mr. Carrano, did you not?—A. Yes, sir.

Q. Will you tell me whether you ever had a shipment from Carrano on Pennsylvania car number 92203?—A. Yes, sir.

Q. And was the contents of that car inspected?—A. Yes, sir.

Q. By Mr. Taylor?—A. That's right.

Q. And what was it found to contain?—A. It contained 24,040 pounds of corrugated and 485 pounds of kraft.

Q. And the 485 represents the extent of the kraft in that particular shipment?—A. Yes, sir.

Q. Were you present at any time while the——

The COURT. Did you pay for that?

The WITNESS. Sir?

The COURT. Was that paid for by your company?

The WITNESS. It was paid on the basis that we took it in.

The COURT. On the basis of what you received or on the invoice?

The WITNESS. No; on the basis of what we actually received.

Q. Can you tell us who was present at the time Mr. Taylor made the inspection of the contents?—A. You mean the first inspection, or when he unloaded it?

Q. Whenever he inspected the contents of the car, who was present?—A. There was one inspection made prior to unloading the car, and it was Mr. Taylor, Mr. Kay, our purchasing agent, myself and two Office of Price Administration officials.

30 Q. Then there was subsequent inspection made?—A. It was inspected when unloaded.

Q. And as to the second car what situation took place?—A. Identical.

Q. And the two Office of Price Administration men were there at that time, too?—A. Yes, sir.

Q. That is all.

Cross-examination by Mr. SOMMER:

Q. Mr. Forman, when was the second car inspected?—A. The second car was unloaded on April 8, 1944, and inspected at that time.

Q. And paid for when?—A. April 24, 1944.

Q. Now, the corrugated was at one price, was it not—insofar as the first carload, you found three different kinds of paper in the carload, didn't you?—A. Yes, sir.

Q. And each one of them was at a different price, was it not?—A. That's right.

Q. And paid for by your company at the ceiling prices, according to the class?—A. Yes, sir.

The COURT. That did not correspond to the invoice?

The WITNESS. No, sir.

Q. And insofar as the second carload was concerned, it was found to be two classes of paper; is that correct?—A. That is correct.

Q. One of them was a paper at $2.75 a hundredweight?—A. $1.75.

Q. $1.75 a hundredweight, and the other was at $1.15?—A. That is correct.

Q. And you paid for that paper to Carrano at ceiling price, did you not?—A. Yes, sir.

31 Q. And in connection with your orders for paper, are all shipments that you buy subject to mill inspection?—A. Yes, sir.

Q. And you pay according to what you find in the load and not according to invoice; is that correct?—A. That is correct.

Q. That is all.

Redirect examination by Mr. ROSSBACH:

Q. Mr. Forman, with respect to the 2.005 pounds of mixed paper, tell us what the ceiling price on that was?—A. We paid $14. I assume that was the ceiling price at that time.

Q. That would be about 70¢ a pound?—A. 70¢ per hundred.

Q. Per hundredweight I mean.

The COURT. Have you had much experience in the examination of these cars?

The WITNESS. I don't ordinarily, your Honor, examine the cars. I do know waste paper.

The COURT. Well, have you had charge of the waste paper receipt at your place?

The WITNESS. No, sir.

The COURT. And their payment?

The WITNESS. No, sir. I am on the purchasing end of the paper, not the inspection, but I do know waste paper from years of experience.

32 VIRGIL B. TAYLOR, called and sworn on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Q. Mr. Taylor, you are employed by the Ohio Box Board Company of Rittman, Ohio?—A. Yes, sir.

Q. What is your official capacity out there?—A. Unloading department supervisor.

Q. And within the scope of your authority do you inspect the contents of cars delivered there?—A. That's right.

Q. And with particular reference to—well, to shortcut it, with particular reference to the two cars just described by Mr. Forman, were you present at the time their contents were examined?—A. Yes, sir.

Q. Did you personally inspect the contents?—A. Yes, sir.

Q. Did you find them to be as he enumerated them?—A. Yes, sir.

The COURT. Were you the regular inspector there?

The WITNESS. Yes, sir.

Q. At any rate, were you familiar with the fact that they were also described upon an invoice?—A. That we do not get.

Q. You don't have anything to do with that?—A. We unload the paper and report it to the accounting office, what we find in the shipment.

Q. Without the benefit of a comparison with the invoice?—A. Without the knowledge of what——

Q. So you come in cold——A. That's right.

Q. And simply report what you see?—A. That's right.

33 Q. And did either of these cars contain any assorted kraft waste paper to the extent of more than 6,735 pounds, as stated by Mr. Forman?—A. He took the information that I returned to the office. I have nothing with me here. He has the report that I made of that car and whatever shows on that unloading which was actually in the car.

Q. Now, take the other car, the second car; did that contain any assorted kraft, to the best of your recollection?—A. To my recollection, I cannot tell.

Q. Nothing further.

Cross-examination by Mr. SOMMER:

Q. Mr. Taylor, you inspect for quality of paper that comes into the mill, don't you? I don't mean you personally, but it is inspected by that department, isn't it?—A. The inspecting—we don't make inspections on every car in the way of inspection. Every car is unloaded and graded as unloaded.

Q. But you inspect the paper as you take it off the car?—A. That's right.

Q. And you grade it?—A. That's right.

Q. And then you report to the office what was in the car?—A. That's right.

Q. And to grade it, you have to undo the bales, don't you?—A. No.

Q. Not entirely; you just grade it by a look on the outside of the bale, is that it?—A. That's right.

Q. And then you report what the bales appear to you to be to the office?—A. That's right.

Q. That's all.

34 CYRUS E. TICE, called and sworn on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Mr. ROSSBACH. If your Honor please, the two previous witnesses are from Rittman, Ohio, and unless Mr. Sommer has some reason or the Court has some reason to believe that they should stay, I should like to have them excused at this time.

Mr. SOMMER. I have no reason.

The COURT. All right.

Q. Mr. Tice, you are associated with the Taggart Corporation?—A. Yes.

Q. And where are you stationed?—A. At 230 Park Avenue, New York, in the New York office.

Q. And what is the official position you hold with the corporation?—A. Accountant.

Q. And in that capacity are you familiar with the books and records as they pertain to shipments or purchases of waste paper made by the corporation?—A. Yes.

Q. And with particular reference to those shipments or purchases made from the defendant Bruno?—A. Yes.

Q. Tell me——

Mr. SOMMER. I am going to object to that question and ask that the answer be stricken out, because the testimony here was that there was no paper bought from Bruno by the Taggart Corporation.

Mr. ROSSBACH. I am sorry. I withdraw that. Technically there was paper bought from Bruno though not from his client.

Mr. SOMMER. That is correct.

35 Mr. ROSSBACH. I shouldn't have said that; I mean I know better.

Q. Will you refer please to on or about March the 1st, 1944 and tell us whether your company took a shipment of waste paper from James Carrano's Sons on railroad car SP 96472?—A. Yes.

Q. What did that shipment consist of?—A. Invoice, No. 1 Assorted Kraft.

Q. And what amount was shown on the invoice as sent to you by Carrano's?—A. $635.62.

Q. Break that down; what did that represent?—A. At $35 a ton plus jobber's allowance of 5½ per cent, and loading charges of a dollar a ton.

Q. Stripped of all the extra charges, what was the base charge made for the waste paper itself?—A. $586.60.

The Court. How much is that per ton?

The Witness. $35 a ton.

Q. And how was the waste paper described on that invoice?—A. No. 1.

Q. In grade?—A. No. 1 Assorted Kraft.

Q. And when did your company make payment for that particular shipment?—A. March 20, 1944.

Q. And was that after you had received a report of inspection of it?—A. Yes.

Q. I will show you what appears to be a freight record and ask you whether you recognize that as being a part of the system of accountancy as conducted in your corporation?—A. Yes; that is.

Q. Now, when did you receive that report?—A. Well, that report is dated March 7, 1944.

Q. And shows the inspection of the contents of this particular car?—A. Yes.

36 Q. And the results of the inspection are shown upon it?—A. Yes; corrugated.

Q. Now, when did you actually receive notice of the inspection?—A. Well, that is hard to say.

Q. Well, now, as a matter of fact, Mr. Tice, in the conduct of your organization—your business, as I understand it, your main office is located in New York?—A. Yes.

Q. The Watertown office is a mill office?—A. It is a mill office.

Q. So that the accountant's records are kept in New York generally?—A. Yes.

Q. When a shipment is made to the Watertown office it is reported back to you for payment?—A. Yes.

Q. Based upon the invoice presented by the seller?—A. Yes.

Q. Is that right?—A. That's right.

Q. So that you then rely upon the report from Watertown as to whether you should pay the invoice or not?—A. Yes.

The COURT. Do they send you a report of what they actually find to be in the shipment?

The WITNESS. No, not usually; they merely approve the invoice on the basis of the report.

The COURT. Well, suppose the invoice is not approved, do you get a copy of the reason for the failure to approve?

The WITNESS. Well, we would in some cases. Usually, if the invoice is not approved it is not sent to the New York office until whatever discrepancy there is is cleared up.

Q. For instance, Mr. Tice, in the ordinary course of activity in the waste paper shipping business, there is a certain amount of water that gets into paper, is there not?—A. Yes.

37 Q. And until the Watertown office irons out that water difficulty with the shipper, you wouldn't get an O. K. to pay the bill?—A. No.

Q. And if you did and if there were a 10-percent water debit in connection with the paper, your office would be notified of it?—A. Yes.

Q. And so too, that would prevail where there was a misgrading of the paper?—A. Yes.

Q. Or a difference in the grade as actually seen, and as represented on the invoice?—A. Yes.

Q. So that, pursuant to the invoice submitted in this particular case, your company then made payment, did it not?—A. Yes.

Q. And I am referring now to a photostatic copy of the reverse side of the invoice and ask you whether you can identify that?—A. Yes.

Q. And what does that represent?—A. That represents the accounting information and the approval by the purchasing and office manager at Watertown.

Q. Right. In other words, that is the stamp of approval put on at Watertown, sent to you, upon which you base payment?—A. That's right.

Q. And in this particular case, the payment as shown on the reverse side here was $635.62?—A. That's right.

Q. And that represents the same price that was stated on the invoice?—A. That is the same price on the invoice.

Mr. ROSSBACH. I ask that the first paper the witness identified as the freight record be marked in evidence.

Mr. SOMMER. No objection.

(Received and marked "Exhibit G-1".)

Mr. ROSSBACH. And the photostatic copy of the back of the invoice, which has previously been marked in evidence.

38 Mr. SOMMER. May I see the front of the invoice? No objection.

Mr. ROSSBACH. Well, if your Honor will permit me I would like to clip the front and back together and offer them all as one exhibit.

The COURT. All right.

Mr. ROSSBACH. Do you want to take a look at the front of it again?

Mr. SOMMER. This cannot be the one because I thought you marked in evidence the invoice from Carrano.

Mr. ROSSBACH. The invoice from Carrano was marked for identification only and the invoice from Bruno we marked in evidence.

Mr. SOMMER. Well, this one isn't marked for identification or anything.

The COURT. It is offered now in evidence. Do you object to it?

Mr. SOMMER. I understood they were marked for identification; this one isn't marked for identification.

The COURT. No; it is marked in evidence, and as one exhibit, indicating the front and back of the paper described by the witness.

Mr. SOMMER. Well, I will object to it, because it is not identified as anything that has to do with Bruno and it isn't one of the papers identified by Carrano.

Q. I refer you to the front of the invoice, Mr. Tice, and ask you if you can further identify that?—A. Yes.

Q. As being what?—A. Photostatic copy of the original invoice.

The COURT. From whom to whom?

39 The WITNESS. From Carrano to the Taggart Corporation.

Q. Now, does that represent the invoice from Carrano to you which can be identified with any of these previous invoices?

The COURT. Carrano has testified that the material that he bought from Bruno was forwarded to the Taggart Corporation at Deferiet, New York. There is in evidence an invoice from Bruno to Carrano. The one that is now sought to be offered in evidence is from Carrano to Taggart and contains the same freight car number and the same description and the same number of pounds. Any objection?

Mr. SOMMER. Not if it covers the same freight car.

The COURT. The same freight car number is on it. Just show him, SP—whatever it is, Southern Pacific. How about the back, Mr. Sommer? Any objection to that?

Mr. SOMMER. No; no objection.

The COURT. All right, let it go in; mark it as one exhibit.

(Received and marked "Exhibit G–12.")

Q. Now, I show you the front and back, photostatic copies of the front and back of another invoice with the freight record.

Will you tell us whether that relates to a shipment previously identified by an invoice?—A. Yes.

Q. I am directing your attention to what has been marked in evidence as "Exhibit G-5."—A. They all look as if they——

Q. Now, refer to the other record; will you tell us whether that represents examination of the contents of that particular shipment?—A. Yes.

40 Q. And specifically referring to the photostatic copy of the back of the certificate, it appears that the amount of $532.47 is reported to you for payment?—A. Yes.

Is that right? Which is the exact amount shown on the invoice based upon an enumeration of assorted kraft?—A. Yes.

Q. Now, will you tell us, please, whether your company actually paid the amount reported for payment?—A. Yes; on February 29.

Q. February 29?—A. Yes.

Mr. Rossbach. I now offer in evidence—it has already been marked for identification as "Exhibit G-6"—with the photostatic copy of the back of it as identified by this witness.

Mr. Sommer. No objection.

(Received and marked "Exhibit G-6.")

Mr. Rossbach. And also the freight record as identified by this witness.

Mr. Sommer. No objection.

(Received and marked "Exhibit G-13.")

Q. And now I show you what has been marked as "Exhibit G-8" in evidence and direct your attention to what has been marked as "G-9" for Identification, and also a photostatic copy of the reverse side of an invoice plus the freight record, and ask you whether they have any association?—A. Yes; they are all related.

Q. They are all related. And, as stated on the reverse side of the invoice, this purports to have been returned to you for payment in the sum of $855.49, which is exactly the amount stated on the invoice based upon shipment of assorted kraft?—A. Right.

Q. And was that amount actually paid by your company?—A. Yes; that amount was paid.

41 Mr. Rossbach. I offer this in evidence, G-9, with the reverse side of it.

Mr. Sommer. No objection.

Mr. Rossbach. And the freight bill.

(Received and marked "Exhibit G-9" with reverse side attached.)

(Freight bill is received and marked "Exhibit G-14.")

Q. Now, Mr. Tice, was anything called to your attention in connection with these shipments which reacted to the payment as you have stated?—A. The payment on invoice 9644 was made, but the check was canceled and it was repaid at a lower value.

Q. And what was the date of repayment?

The COURT. What do you mean the check was canceled?

The WITNESS. Stopped payment on the check.

Q. And on what date did you stop payment?—A. April 6.

Q. And what is the date of the check?—A. April 4.

Q. Now, did you have a reason for stopping payment?—A. Yes; on the basis of a report.

Q. From whom?—A. From our mill. The invoice which is for assorted kraft, it was found that it was not assorted kraft, it was a lower grade of paper.

Q. What grade?—A. Well, corrugated, on which the ceiling price is $23 a ton, and we then made payment on this invoice on that basis.

Q. All right; and the invoice was corrected?—Well, we corrected the invoice ourselves.

The COURT. You paid on the basis of your report?

The WITNESS. Yes.

42 Q. Now, had you previously received any reports from the mill with respect to the inspection of any shipments received by the mill from Carrano?—A. No; we hadn't in the New York office.

Q. You have been doing business with Carrano for some time?—A. Yes.

Q. To the best of your knowledge, have you ever canceled out a transaction as involving assorted kraft because it was reported to you that it involved corrugated?

Mr. SOMMER. Objected to as wholly immaterial.

The COURT. What is the purpose?

Mr. ROSSBACH. The purpose is to show that the correction in this particular case was made for a very certain and definite occurrence which took place on that day.

The COURT. If you have evidence that it was so done you don't improve it by showing that something else wasn't done. I sustain the objection.

Q. Now, on what date was your corrected check sent out?—A. May 19.

Q. 1944?—A. 1944.

Q. Nothing further.

Cross-examination by Mr. SOMMER:

Q. I show you, Mr. Tice, Government Exhibits G–11, 13, and 14 which you have identified as being the freight record covering these three shipments; is that correct?—A. Yes.

Q. Those freight records were made after inspection at the mill, were they not?—A. Yes.

Q. And all of them show the shipment to be corrugated paper,

do they not?—A. Well, of course this one just shows waste paper corrugated.

43 Q. And this one?—A. Corrugated.

Q. And this one?—A. Corrugated.

Q. So that at the mill there was an inspection and a report made that the paper was corrugated; is that right?—A. Yes.

Q. And payment was made, you say, to Carrano and then an adjustment made afterwards when the office picked up the error; is that correct?—A. Yes.

Q. No money was ever paid by your company to Bruno in connection with these transactions?—A. No.

Q. Now, all of your purchases were subject to mill inspection, were they not?—A. Yes.

Q. And if paper was different from invoice, then it was adjusted and the New York office notified you; is that correct?—A. Yes.

Q. That's all.

Redirect examination by Mr. ROSSBACH:

Q. And you would then notify Mr. Carrano, is that right?—A. That's right.

Q. But if you were not notified by the mill, there would be nothing for you to notify Mr. Carrano about, would there?—A. No.

Q. And the payment went through?—A. Yes.

Q. And you paid the full amount as shown on the invoice to Mr. Carrano?—A. Yes.

Q. With respect to three shipments, your attention has been called to, there was only one shipment where a debit was engaged in?—A. Yes.

Q. And the other two were paid in full?—A. Right.

Q. And no adjustment has ever been made on them?—A. No.

Q. Nothing further.

Mr. ROSSBACH. Mr. Duffy.

44 Mr. SOMMER. May I ask Mr. Tice one question?

The COURT. Yes; just come back a minute.

By Mr. SOMMER:

Q. If the inspection report had been called to the accounting office's attention, the checks would have been sent out according to what the inspection revealed, would they not?—A. Yes.

Mr. ROSSBACH. I object to that because——

The COURT. It follows from your question.

A. Yes.

Q. And it was not until some time after payment that the accounting office discovered that the inspection report and the invoice differed?—A. Yes.

Q. That's all.

The COURT. Was there an inspection of the other two cars; the other two shipments?

The WITNESS. Yes; every car has one, and that goes into the mill office at Watertown on which they base their records of inventory and approve the invoice to be sent to the New York office.

The COURT. How long after the check was paid was there a discovery of the error?

The WITNESS. May I see the freight record and the date on that?

Mr. ROSSBACH. You mean the back of it?

The WITNESS. I want the date. The invoice is dated March 21st. The car wasn't received and unloaded at the mill until March 27.

The COURT. Payment made on that according to invoice?

The WITNESS. Yes; payment was made on this—I am sorry, the date stamp is so faint I cannot see it in this light but it was, I think, April 1st.

45 The COURT. And when was the discovery of the report?

The WITNESS. The discovery of the report was made April 6th, the date we stopped payment on the check.

The COURT. Is that for all three shipments?

The WITNESS. No, your Honor, that is only one.

The COURT. Now, then, there were two other shipments. Was there ever any report received of variation between the invoice and the actual contents of the car?

The WITNESS. No; none.

By Mr. ROSSBACH:

Q. Mr. Tice, on April the 6th you stopped payment on the check?—A. Yes.

Q. Did you get information from Watertown from your office up there, that your Watertown mill had been visited by an Office of Price Administration agent?

Mr. SOMMER. I object to that as hearsay.

A. Prior to April 6th?

The COURT. If it is on the record of the company and he has it here he may testify to it. Is there any such record?

The WITNESS. I have not. There may be in the company.

Q. Nothing further.

Re-cross-examination by Mr. SOMMER:

Q. Just a moment. You say there was no report on the contents of the other two cars?—A. There was no report

46 to the New York office that the contents were not as invoiced.

Q. But the company had records which they didn't send to the New York office, showing an inspection of the cars and showing that they were corrugated?

Mr. ROSSBACH. I object to that, I think it is a matter of argument.

The COURT. Do you know it?

The WITNESS. No.

Q. These are records of your company?

The COURT. The records speak for themselves. Let the records speak.

Mr. ROSSBACH. I asked him that before and he testified that the records showed it was corrugated as a result of the inspection.

The COURT. No; he didn't say as a result of the inspection; he said the records showed it was corrugated. Now let's see. These purport to be freight records of the Taggart Corporation for three different shipments; are they?

The WITNESS. Yes, sir.

The COURT. And these are made by whom, Morrison and Murphy; right?

The WITNESS. Yes.

The COURT. Who are Morrison and Murphy?

The WITNESS. Yard foremen Mr. Morrison was, but he is now dead.

The COURT. Then that report to you showed the receipt of cars containing waste paper, two of them called corrugated, one waste paper; is that right?

The WITNESS. The other one is also marked corrugated down here.

The COURT. Marked corrugated below?

47 The WITNESS. Yes, sir.

The COURT. And these are the records forwarded to your office from the Watertown office?

The WITNESS. Yes.

FRANCIS C. DUFFY, called and sworn on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Q. Mr. Duffy, you are connected with the Office of Price Administration?—A. Yes, sir.

Q. Stationed where?—A. At the Regional Office at Cleveland, Ohio.

Q. Did you have occasion to visit the premises of the Ohio Box Board Company at Rittman, Ohio?—A. I did.

Q. Will you tell us on what date you were there?—A. April 6th.

Q. What year?—A. 1944.

Q. What was the purpose of your visit; what did you do?—

A. To grade some cars of waste paper that had arrived at the Box Board mill there.

Q. Did you identify the cars by number?—A. Yes, sir.

Q. Do you have those numbers?—A. I do.

Q. What were the numbers of the cars?—A. There were three cars that were inspected that day, Pennsylvania Railroad 57253; Pennsylvania Railroad 92203; C. B. & Q. 22160.

Q. All right. Now, with specific reference to C. B. Q. 22160 and Pennsylvania 72153—Is that about right—What is the first one you mentioned?—A. Pennsylvania 57253.

Q. That one, and the 22160, what did you find those cars to contain?—A. Pennsylvania 57253 contained corrugated paper only.

48 Q. And how about the other one?

Mr. Sommer. Well now, I am going to object to that because that isn't one of the cars mentioned here. I don't know what car that is. It isn't one of those mentioned in the indictment.

Mr. Rossbach. The only things I am interested in are the ones mentioned in the indictment.

Mr. Sommer. Well, I assumed so.

Q. Pennsylvania 92203, have you got that one?—A. Yes, sir.

Q. And C. B. Q. 22160, I asked for those. What do those contain?—A. Pennsylvania 92203 contained very inferior grade of corrugated paper.

Q. Based upon your knowledge of the regulations of the Office of Price Administration and inspection of the paper, at what ceiling price was that paper permitted to be sold?—A. At $23.

Q. For what?—A. Per short ton.

Q. And as to the other car?—A. C. B. & Q. 22160 contained corrugated paper, contained one bale of kraft paper and some loose rolls of kraft paper.

Q. You are positive those did not contain a solid content of kraft?—A. No, sir; it did not.

The Court. Now, let see what proportion was there of kraft?

The Witness. I wouldn't know the weight of the bale of kraft paper, your Honor, but we estimated that the roll paper weighed about—our estimate went to all the kraft paper in the car, and we estimated that the car contained approximately two and a half tons of kraft paper, both bale and loose in the roll.

49 The Court. And how much was there altogether in the car?

The Witness. I don't have the invoices; I don't know the exact amount of the poundage that was invoiced in the car.

The Court. Well, what I am trying to get at is what proportion of the contents of that car was of the type of paper for which the ceiling was $35 a ton—corrugated kraft, was it?

Mr. ROSSBACH. No; assorted kraft.

The WITNESS. I don't know the weight of the total car, I mean I don't know how many pounds were invoiced in that car. I merely graded it as to quality.

The COURT. Well, how much, one-third or one-fifth, or what—you don't know how much was in the car at all?

The WITNESS. Oh, I would say on the basis of the loading of the car——

The COURT. Do you have any record of the examination made?

Mr. ROSSBACH. That has been testified to.

Mr. SOMMER. It has been testified to that the exact amount was 2,005 pounds mixed paper; 25,990——

Mr. ROSSBACH. 979.

Mr. SOMMER. Or nine hundred some of corrugated paper, and 27,735 pounds of assorted kraft.

The Court. So that practically half, was it?

Mr. SOMMER. No; twenty-five thousand as against eight thousand.

The COURT. Give me those figures again. It was invoiced as——

Mr. ROSSBACH. Assorted kraft.

The COURT. How much assorted kraft was there?

Mr. ROSSBACH. It was invoiced as 35,310 pounds, I believe, assorted kraft and then it was found——

The COURT. Actually what was it?

Mr. SOMMER. It was found to contain 2,005 pounds of mixed paper, 259——

The COURT. Wait a minute. Mixed paper, how much?

Mr. SOMMER. 2,005; twenty-five, nine hundred and some odd——

Mr. ROSSBACH. 79.

The COURT. Let me have it. What is it? How much assorted kraft?

Mr. SOMMER. 6,735.

The COURT. 6,735 pounds, and the balance was?

Mr. SOMMER. Corrugated.

The COURT. How much?

Mr. SOMMER. Twenty-five thousand, nine hundred odd pounds, and the other car was testified to.

The COURT. All right. Now, let me ask him. The corrugated paper had what ceiling?

The WITNESS. $23 per short ton.

The COURT. And the assorted kraft $35?

The Witness. $35

The COURT. Now, can you describe assorted kraft?

The WITNESS. Yes. Assorted kraft is the ordinary wrapping

paper or ordinary bag that you get in the store, the bag that you get, the sugar bag.

The COURT. Is there any difficulty in distinguishing between corrugated paper and assorted kraft?

51 The WITNESS. Yes, sir. Under the terms of the regulation MPR 30, there is no corrugated paper in——

The COURT. Will you just listen to my question? Is there any difficulty in distinguishing between it if you look at it?

The WITNESS. No, sir; none at all.

The COURT. You can tell immediately that corrugated paper is corrugated paper?

The WITNESS. That's right.

The COURT. And that assorted kraft is of the type that you want.

The WITNESS. That's right.

By Mr. SOMMER:

Q. This corrugated paper was made from kraft, wasn't it?—A. No; you take corrugated, it can be made from most any type of paper.

The COURT. Well, whether it is made of kraft or anything else, the ceiling price is $23?

The WITNESS. That's right.

Q. Now, you said the other car contained no kraft.

Mr. ROSSBACH. No; the C. B. Q. he has testified to.

The WITNESS. The C. B. Q. contained some kraft.

Q. The Pennsylvania 92203, you say that didn't contain any kraft?—A. No; upon my investigation I checked it as containing corrugated.

Q. If I were to tell you that an inspection at the company showed that there was 485 pounds of kraft bag in the car, would you say that that is incorrect?—A. No, sir; it is quite possible.

52 The COURT. How many pounds altogether in that car?

Mr. SOMMER. Your Honor wants the exact figure, I can give it to you; 25,620 pounds.

Mr. ROSSBACH. Nothing further.

JOHN MARKEY, called and sworn on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Q. Mr. Markey, you are connected with the Office of Price Administration?—A. I am, sir.

Q. Stationed in Newark?—A. Yes, sir.

Q. Did you have occasion to visit the offices of the T. Bruno Paper Stock Company?—A. I did.

Q. Tell us the date of your first visit there.—A. April 5, 1944.

Q. And as a result of that visit did you——

The COURT. Where is it?

The WITNESS. On McKinley Street, Hackensack, New Jersey.

Q. As a result of that visit did you have occasion to inspect the books of the company with relation to the shipments which have been already identified by the invoices?—A. Not on that day, sir.

Q. On some subsequent day did you do it?—A. Yes, sir.

Q. What, if anything, did you find?—A. We found with respect to car number C. B. Q. 22,160, that the ledger of Bruno showed the sale of 35,310 pounds of assorted kraft.

Q. Did it show to whom it was sold?—A. It was in the Carrano, James Carrano account.

53 Q. All right; and did it show the amount for which it had been sold?—A. In the ledger record it showed an amount of $476.69.

Q. And did you check that through to see how much was recorded as actually received?—A. We checked the invoice that had been given to Carrano for that particular shipment and the invoice to Carrano was for $635.59.

Q. I mean this. What I meant is not the actual amount received, I meant the amount invoiced. Now, with respect to—you mentioned C. B. Q. Is that the one you just got through talking about?—A. C. B. Q. 22,160.

Q. Now, with respect to Pennsylvania 92,203, what did you find?—A. We found that there had been billed to Carrano 25,620 pounds of assorted kraft and an invoice to Carrano was $461.16 and that the ledger record kept by the defendant for that particular shipment showed $345.87.

Q. And with respect to that shipment identified with B. & O. 385,622 what did you find?—A. We found that there had been invoiced to Carrano 28,080 pounds assorted kraft in the amount of $504.44, and that the ledger account for Carrano showed a debit of $379.08.

Q. What do you mean a debit?—A. A charge for that particular shipment to Carrano.

Q. And with respect to that shipment identified as Southern Pacific car 96,472 what did you find?—A. We found that there had been billed to Carrano 33,520 pounds assorted kraft, total price $603.36, and that the ledger record disclosed $452.52.

Q. And with respect to the shipment contained on K. C. So. 25,293 what did you find?—A. Found that there had been billed to Carrano 45,115 assorted kraft for $812.07 and that the ledger record disclosed $609.06.

Q. So that in each instance there was a ledger record showing a cash receipt of less than the amount actually invoiced or

54 billed; is that right?—A. It didn't show the receipt, it showed the debit to Carrano for that particular amount.

Q. Did you have a conversation with Bruno relating to the difference in those figures?—A. Yes, we did.

Q. And did you get an explanation as to what those debits represented?—A. Yes, we did.

Q. What was his explanation?—A. His explanation was that he had been managing the business for his brother and that he had been receiving a very low salary from his brother, and that the only additional compensation that he could get would be by means of making the false entries into the ledger account.

Q. Did he at any time indicate to you that the differences were due to an adjustment of a misgrading of material or waste paper?—A. No, sir; he did not.

Q. Did his books in any way reflect an adjustment back against him for a determination at some other point of a difference in the grading of the waste paper that he shipped?—A. I don't think I can answer that question the way you put it.

Q. I am sorry. I got a little bit mixed up on that one myself. What I mean is this: As a result of a determination at some point after the shipment took place——

The COURT. I think you are a bit mixed up again. Better think it over and let me ask a question while you are framing it.

Was there anything in the books which would indicate that a correction had been made because of a complaint made by Carrano, or anybody else, that the goods shipped by the invoice did not equal in content and quality what was set forth in the invoice?

The WITNESS. No, sir.

The COURT. Is that what you were trying to say?

The WITNESS. Yes, sir.

55 Q. Did you have a conversation with him regarding the type of waste paper that he was selling to Carrano?—A. On April 5, when we visited the defendant's place of business, we had a conversation with him and he stated to us that the Ohio Box Board had been complaining about the mix, and that in the future he was only going to make bales of news, corrugated, and mixed paper. I then asked him why there had been a complaint and he said that he had been putting some corrugated into his shipments of assorted kraft.

Q. Did you further get from him any statement as to the amount of corrugated he was selling to Carrano in a ratio to the kraft that he was selling?—A. No, sir.

Q. Nothing done about that?—A. No, sir.

Q. Did you examine the premises that he operated?—A. Yes, sir.

Q. What did you find it consisted of?—A. We found that the defendant had a warehouse where he baled paper.

Q. By baling do you mean bundling it up?—A. By baling we mean putting it in a machine which pressed it into a bale.

Q. And did you inspect the paper that was at the warehouse?—A. We saw paper at the time at the warehouse; yes.

Q. Did you see any particular types?

The COURT. I don't think it makes any difference what he saw

Mr. ROSSBACH. I won't press it. Nothing further.

Cross-examination by Mr. SOMMER:

Q. This was on April 5 you say?—A. The first visit was on April 5.

Q. And the next visit was when?—A. April 11.

56 Q. And the ledger account showed debits due to the company from Carrano, you say?—A. Yes, sir.

Q. And they did not at that time reflect payment?—A. Yes, sir.

Q. That's all.

Mr. ROSSBACH. Now I am confused.

Redirect examination by Mr. ROSSBACH:

Q. Your answer "Yes" to that, do you mean to say that at that time they did not reflect a payment of the amount shown?—A. The books reflect a shipment of a certain amount of assorted kraft.

The COURT. How about the financial end of it?

The WITNESS. Well, the ledger showed that—the ledger that he kept showed that, yes, sir.

The COURT. Did the books show that Carrano had made any payment for the paper shipped under those invoices, or was it just a charge registered against him?

The WITNESS. It was just a charge.

The COURT. Didn't indicate actual payment?

The WITNESS. No, sir.

Q. Then what did you mean before when you said that it showed a charge item and then another item in a different amount?

The COURT. No; he said that it showed an invoice amount of so much and then a debit charge. In other words, that the amount charged according to the invoice was shown on the invoice side, but the amount which was charged on the ledger to

57 Carrano was different than the amount charged for the same shipment, but there was no record of actual payment of either one.

The WITNESS. No, sir.

The COURT. All right, we will digest that information over the

evening and meet again tomorrow morning at 10 o'clock. The jury will be excused first.

(Adjourned to Thursday, January 25, 1945, at 10 o'clock A. M.)

NEWARK, N. J.,
Thursday, January 25, 1945.

(Case continued.)

(Appearances, as before.)

The COURT. You may send for the jury.

(Proceedings resumed in presence of the jurors.)

Mr. ROSSBACH. I believe, sir, that Mr. Markey was on the stand when we terminated yesterday's proceedings.

JOHN MARKEY resumed the stand.

Redirect examination (continued) by Mr. ROSSBACH:

Mr. ROSSBACH. I think the last series of questions were directed at the entries in the ledger as examined by this witness.

The COURT. Yes.

58 Mr. ROSSBACH. Explaining the difference in the amounts, and with that I am through with the witness.

Mr. SOMMER. I have no further questions.

The COURT. All right, you may step down.

Mr. ROSSBACH. The Government rests.

The COURT. Now, ladies and gentlemen, you were summoned not knowing that the Government was going to rest. Now we will have some legal argument in which you are not concerned, so you will be excused.

(Jury excused.)

Motion for dismissal of information

Mr. SOMMER. Your Honor please, at this time on behalf of the defendant Louis Bruno, reserving my right to interpose a defense in the event that your Honor should deny my motion, I move for a dismissal of this information or, in the alternative, a directed verdict of not guilty on each of the counts therein, upon the following ground: that the proof offered here does not sustain the charge in the indictment. The indictment charges that the defendant Louis Bruno was an agent or employee-manager of Teresa Bruno, trading under the name of T. Bruno Paper Stock Company at Hackensack, New Jersey, and that as such manager he became subject to the maximum price regulation number 30; that on various days he did willfully, knowingly, and unlawfully sell certain waste paper to James Carrano's Sons at prices in excess of the maximum price permitted under the regulation, each count of the indict-

ment being identical excepting that the date is different, the quantity is different and the place to which it was shipped is different.

59 The proof here is that there was a sale of paper, five carloads to James Carrano's Sons, that the paper was sold under an agreement that the price would be fixed subject to inspection at the mill; that though an invoice was sent at the time of shipment, the invoice price was to be either increased or decreased dependent upon inspection at the mill of the paper. The paper was then inspected at the mill; the mills sent reports to Carrano and Carrano then debited the account of T. Bruno Paper Stock and in forwarding their subsequent checks, took out the amount of money that was the difference between the invoice price and the actual price that should have been paid under the agreement.

According to the testimony of Carrano, there was never one cent paid to this defendant or to T. Bruno Paper Stock over and above the ceiling price for the paper that was delivered.

That is the testimony in the case; that is the proof in the case, and where the person who has purchased the merchandise testified that he did not pay one cent over the ceiling price, I say that there is no proof before this count that there was anything paid over and above the ceiling price.

For that reason I respectfully submit the motion should be granted.

(Argument of counsel for the Government.)

The COURT. I think, Mr. Sommer, that taking, as we must, the Government's case as admitted in the present posture of the case I shall be compelled to submit it to the jury, because it is a question of fact which is involved in all five shipments. I shall therefore deny your motion. You may have an exception.

60 I shall recess now in order to send for the jury.

(Which exception is hereby allowed and sealed accordingly.)

THOMAS F. MEANEY. [Sealed]

(Proceedings resumed in presence of the jury.)

(Mr. Sommer opened on behalf of the defendant.)

LOUIS BRUNO, called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. SOMMER:

Q. Where do you live, Mr. Bruno?—A. Hasbrouck Heights, New Jersey.

Q. And what is your business?—A. Paper stock business.

Q. And in February and March of last year who owned the business where you worked?—A. Teresa Bruno.

Q. And who is Teresa Bruno?—A. My sister-in-law.

Q. And under what arrangement did you work there?—A. Getting $20 a week salary plus some agreement being made between my brother and I; commission basis.

Q. Now, in the conduct of that—About how much paper do you handle a week there?—A. Anywhere from 300 to 500 tons a week.

Q. And in connection with that business did you receive any orders from James Carrano & Sons?—A. Yes.

Q. I show you four purchase orders which are marked "D-1" for Identification, and ask you if those are copies of the orders which you received from James Carrano & Sons?—A. Yes.

61 Mr. SOMMER. I offer these in evidence.

Mr. ROSSBACH. Well, are they orders that apply to these particular shipments?

Mr. SOMMER. Yes.

Mr. ROSSBACH. Will you have him say so and I have no objection.

Q. Did these orders cover these shipments as well as other shipments?—A. I believe they do, because I don't know the dates or the car numbers after we shipped it out; they would be the orders.

The COURT. Well, there seem to be 18 cars here and only five in question. Can he pick out which related to these shipments?

Mr. SOMMER. Well, Carrano has testified that those are the orders that were given that included these shipments.

The COURT. Let him pick out the ones that applied, because there are 18 cars here and they are for different things. Here are five cars, three cars, another five cars, another five cars, and some of them relate to a different type. Pick out those which refer to these five shipments.

Mr. SOMMER. I won't be able to pick up the exact cars, but these mills they were instructed to ship stock to, they used all those kinds of paper.

The COURT. Yes; but there is only a question about five cars, five orders; are there five cars?

Mr. SOMMER. Well, then probably the five cars that the OPA picked up—I don't know—I wouldn't know——

The COURT. Well, is there any way of indicating which of these orders refer to those five cars?

Mr. SOMMER. I think I can pick up three of them for you.

62 The COURT. Suppose you do.

Mr. SOMMER. I cannot do it until I get the things in evidence.

The COURT. Well, if you can do it after you get the things in evidence you can do it before.

Mr. SOMMER. But I have another paper which I have to use.

The COURT. Ask him about the other paper.

Mr. SOMMER. I don't know whether he can pick it out or not, but the papers speak for themselves.

The COURT. Let's see what the other paper is.

Mr. SOMMER. This he doesn't know anything about.

The COURT. What is that?

Mr. SOMMER. That is an order from Taggart with the corresponding numbers on it.

The COURT. Taggart to whom?

Mr. SOMMER. This is order from Taggart to James Carrano.

The COURT. How could he identify that and how are you going to get it in evidence?

Mr. SOMMER. It has been identified.

The COURT. Is it in evidence?

Mr. SOMMER. No; it has been identified, but I am going to offer it in evidence.

The COURT. All right.

Mr. SOMMER. And the numbers on there and the numbers on here——

The COURT. Offer it in evidence.

Mr. ROSSBACH. I object to it, your Honor, please, on this ground: that your Honor has limited the inquiry to the five counts in the information; I think that anything that is contained on
63 these sheets would only tend to confuse it by a misdescription of the character of the paper enumerated on these sheets. It includes not only corrugated but all types of paper.

The COURT. Let me see it.

Mr. ROSSBACH. Now we have excused the witness from the Taggart Corporation and from Watertown or from Rittman, Ohio.

The COURT. What are these pencil notations on here, Mr. Sommer?

Mr. SOMMER. They represent the order numbers.

The COURT. Order numbers to him?

Mr. SOMMER. No. Your Honor will find——

The COURT. What are these pencil notations on here?

Mr. SOMMER. Those are showing the corresponding items. Now, on the first one you won't find those order numbers, because the first and second ones I believe, are Ohio. The last two are Taggart.

Mr. ROSSBACH. May I suggest something to the Court, please?

The COURT. What is it?

Mr. ROSSBACH. And this won't do Mr. Sommer any harm I am sure. If it is Mr. Sommer's intention to offer those in evidence for the purpose of establishing that they contain a statement to

the effect that it is "Subject to inspection at the mill" I have no objection at all to an instruction from the Court to the jury that they definitely so show. Other than that, my only objection to their offer in evidence is the fact that they contain so much other unrelated matter, that it may tend to confuse the issue as it is here presented.

The COURT. Well, let's find out. What is your purpose in introducing these, Mr. Sommer?

64 Mr. SOMMER. First, to show what the orders were that were sent to him by Carrano; to show the terms of the orders, and to show the terms of the orders from the mill to——

The COURT. Let me call attention to something here [indicating to Mr. Sommer at side bar].

Mr. SOMMER. I offer in evidence these orders identified by Carrano as having been the orders which he sent to T. Bruno which cover the cars in question.

Mr. ROSSBACH. And I renew my objection for the reasons stated.

The COURT. Well, I think that it is proper to show such of these orders, orders from Carrano to Bruno, as correspond with the numbers in the list identified by Carrano was that?

Mr. CARRANO. Yes, sir.

The COURT. I shall allow those two to go in.

Mr. SOMMER. There are three covering Taggart.

The COURT. The other covers what?

Mr. SOMMER. The other is the order covering the cars shipped for Ohio.

The COURT. All right, I will allow all of them.

(Received and marked "Exhibit D–1.")

Mr. SOMMER. Then I offer in evidence the order from Taggart Corporation to James Carrano.

Mr. ROSSBACH. Same objection for the same reason.

The COURT. I will allow it.

(Received and marked "Exhibit D–2.")

Q. Now, Mr. Bruno, in connection with the orders that you received from James Carrano, did you ship any merchandise to Ohio?—A. Yes.

65 Q. I show you G–1 for identification and ask you if that is an invoice covering one of the shipments made to Ohio?—A. Yes.

Q. I now show you G–3 and ask you if that is an invoice from T. Bruno Paper Stock to James Carrano covering the second one of those shipments?—A. Yes, sir.

Q. I now show you——

The COURT. They both call for carload of assorted kraft?

The WITNESS. That's right.

Q. I now show you G–5 and ask you if that is an invoice from

you to James Carrano covering one of the shipments that was made in compliance with the orders that you received from Carrano to New York; Watertown, New York?—A. Yes.

The Court. What did that call for?

The Witness. No. 1 Assorted Kraft.

Q. I now show you G–7 in evidence, and ask you if that in an invoice from T. Bruno Paper Stock to James Carrano's Sons covering another carload that was shipped to Watertown, New York?—A. Yes.

The Court. What does that call for?

The Witness. No. 1 Assorted Kraft.

Q. I now show you G–8 and ask you if G–8 is another invoice from T. Bruno Paper Stock to James Carrano's Sons covering a third carload that was shipped to Watertown, New York?—A. Yes, sir.

The Court. What does that call for?

The Witness. No. 1 Assorted Kraft.

66 Q. Now, in connection with these sales to Carrano, what was the agreement between Carrano and yourself as to the price that you would receive for paper shipped?

Mr. Rossbach. I object to that.

A. Ceiling——

Mr. Rossbach. On the ground that the purchase order, the invoice and all other related papers offered in evidence speak for themselves; and as a matter of fact, the evidence is that there was no other agreement except as stated on the order.

The Court. No; I think this is a matter of evidence as to what actually happened. We are not now tied down by such rules as might affect a civil suit for proving existence of a contract or civil responsibility; we are now questioning this man's criminal responsibility if any. What was the arrangement made?

The Witness. To receive ceiling price, any stock I shipped.

Q. And who was to determine the quantity and quality of the paper which you shipped?—A. The paper mill.

The Court. You sent out an invoice for five cars of No. 1; what was it?

The Witness. Assorted Kraft.

The Court. No. 1 Assorted Kraft, and you charged for these five carloads on the basis of No. 1 Assorted Kraft in the invoice?

The Witness. Yes.

The Court. All right. Go ahead.

Q. Why was it invoiced as No. 1 Assorted Kraft?—A. Why?

67 Q. Yes.—A. Could I explain my own way?

Q. Yes.—A. Your Honor——

The COURT. I don't know how you can explain it anybody else's way.

A. Well, you see, the packing house, we pack all grades of stock, assorted kraft, corrugated kraft, newsprint, and mixed paper which is a kraft paper; any time we didn't have any carful of No. 1 Assorted Kraft we could put other grades in and call it Assorted Kraft; anything. Then the paper mills that make the inspection as to weights and quality make reports to Carrano; when Carrano receives those reports they pay us accordingly and make such adjustment in our payment.

The COURT. Well, do you know what you paid out?

The WITNESS. Your Honor—we have no small scale, you see; bales come about 1,000, 1,100 pounds; we have a platform scale, and when I give an order to my men they shall buy an order of assorted kraft, they know that we can put something else in that car in case we haven't got enough assorted kraft to fill up the car, we put something else in it.

The COURT. Let met ask you. I think in this Pennsylvania car 92,203—correct me if I am wrong—that you say contained 25,620 pounds——

The WITNESS. That is correct.

The COURT. In that there was 400 pounds of assorted kraft.

Mr. SOMMER. 400 and some odd pounds of assorted kraft.

The COURT. The rest was corrugated?

The WITNESS. The rest was corrugated.

68 The COURT. Now, would you know before you sent a car out if it contained 25,200 pounds of corrugated and only 400 pounds of kraft, would you ship it out as kraft?

The WITNESS. If I know; no, sir.

The COURT. Well, wouldn't you know?

The WITNESS. There is no ways to know, because most of the time I am not there and the stock is not weighed separately. I will explain about the scale we have there; we have a 28' scale; we put the load on the truck and weigh the whole truck and deduct the truck, and the rest is merchandise. The reason we bill it at No. 1 Assorted Kraft, that's what the order calls for, knowing that we won't get paid—I ain't at the mills—they make all this inspection; in fact one of those bills there we put in some stock was above, better stock than No. 1 Assorted Kraft. There was a stock in there, 400 some odd pounds worth $2.75 per hundred, which I believe it is $55 a ton—we still billed it out at $35. And when we get those reports from Carrano, then Carrano takes the difference we overcharge, he takes it off. If we got any money coming he credits to us.

Q. Now, when you get the orders do you personally fill the orders?—A. What do you mean do I personally fill the orders?

Q. Do you personally go out and load the cars or anything?—A. No, sir.

Q. What do you do, send orders out to the plant?—A. That's right; we have an office there with a girl who takes care of the orders. We have a foreman—not exactly a foreman, a fellow, one of the old fellows in the shop—he loads the truck.

69 The COURT. How many employees have you?

The WITNESS. Right now, anywhere from eight to 12 people. We lose them every day. We hire them every day.

Q. When you give an order for a load of assorted kraft to be shipped, do you see it actually shipped?—A. I do not, sir.

Q. Now, do you give any instructions if there isn't sufficient kraft in the place what they are to put in the load?—A. Well, you see, they generally stop in the office and say, "What else can we put in the car in case we run short of kraft?" The girl says, "Well, there is mixed paper on this order, or corrugated, or newsprint." They go according to that.

Q. Now, do you know how much assorted kraft you had in stock, around the time of these orders?—A. Well, I wouldn't know exactly, but it is quite a load, because we have quite a big place and bales are thrown all over the place.

The COURT. Well, don't you separate your paper into different parts?

The WITNESS. We do—well, one time we make a bale of mixed, which is scrap; another newsprint; another No. 1 Assorted Kraft; another time something else.

The COURT. Well, if you are going to sell assorted kraft you are not going to give a man newspaper.

The WITNESS. In case we run short in kraft; yes.

The COURT. No; if you don't run short.

The WITNESS. If we don't run short we weighed——

70 The COURT. That's what I say. Then do you separate the different types of paper into different grades?

The WITNESS. We do.

The COURT. Or do you put it all together?

The WITNESS. Not all together, it is one bale here, one bale here—all mixed up through the plant.

Q. Now, this corrugated paper; is that kraft?—A. Most of it is; yes.

Q. Do the mills accept it?—A. Yes.

Q. And then you get paid according to what it is worth; is that correct?—A. That's right; they make the price.

Q. Now, in connection with these sales did you receive any word from James Carrano & Sons about there being any trouble with the merchandise that you sent out?—A. Well, after he receives his report he generally calls me up and says, "We have so and so here.

now what do you want to do with that car?" He is dissatisfied. I say let the paper mill decide because they know better than we do.

Q. Is that the ordinary thing to have happen in the business?—Oh, yes.

Q. In connection with these particular cars was there an adjustment made on the bills?—A. Yes.

Q. And are these debit memos that you received from Carrano?—A. Yes, sir; there is one, there is a second one; yes, sir.

Q. Now, in following out this procedure, did you receive any moneys above the ceiling price for any of the paper which you shipped?—A. No, sir.

Mr. SOMMER. You may cross-examine.

71 Cross-examination by Mr. ROSSBACH:

Q. You mean that, Mr. Bruno, that you didn't get any money over the ceiling price, over the maximum price, for the paper that you shipped?—A. No, sir; I didn't.

Q. Well, you know the difference between assorted kraft and corrugated paper; don't you?—A. Yes, sir.

Q. And as a matter of fact, when you ship it and you don't have a full carload to pack and you find that part of the carload is assorted kraft and part is corrugated, you bill it that way; don't you?—A. We haven't got any separate weights; we have two kinds of merchandise—I wouldn't know what's what.

The COURT. How do you know how many pounds you ship out?

The WITNESS. Well, we know the pounds you see.

The COURT. How do you know?

The WITNESS. We have a platform scale for trucks that go out; there is a certain truck takes the load out, pulls on that scale empty, then he pulls on the scale loaded and subtracts the car weight, and the difference is the stock.

Q. So that that is your explanation as to these five invoices, that the entire lot or entire load is billed as assorted kraft?—A. That's right.

Q. You simply throw it in, don't distinguish between the different grades and simply rely on the mill to make a final inspection?—A. That's right.

Q. You bill it as assorted kraft?—A. That's right.

Q. And as a matter of fact, referring to Exhibit G-1, you billed it as assorted kraft and charged the total of $635.59?—A. Probably that's the amount.

Q. Well, take a look. Isn't it?—A. That's right.

72 Q. And you actually received $635.59 for it, didn't you?—A. Yes, sir.

Q. Now, this is the invoice that is dated March 31, 1944, and was shipped on C. B. Q. 22,160; you then got your check from Carrano; is that right?—A. Yes, sir.

Q. Now, what amount did you enter in your books in connection with the accounts receivable on that particular shipment?—A. I wouldn't know right offhand.

Q. Do you have your books with you?—A. No.

Q. You don't have your ledger accounts?—A. No.

Q. Did you enter this amount, do you know?—A. No, sir.

Q. Why not?—A. Because that was the arrangement I made with my brother and myself, that the difference, whatever went in the ledger, was supposed to be mine.

Q. Well, was the amount that you actually entered in the ledger less or more than that?—A. Less than that; the company ledger.

Q. Where did you keep a record of the actual amount that you received from Mr. Carrano?—A. I kept it in the office.

Q. And what happened to the difference between the amount you actually received and the amount you had entered in the ledger; you kept it?—A. That's right.

Q. That was your money?—A. That's right.

Q. Now, you heard Mr. Markey testify that on his examination of your books he found that there was some item of four hundred and seventy-odd dollars?—A. That was the difference.

Q. So it was the difference between $479 and $635 that was your take on this shipment of March the 31st, 1944?—A. That's right.

Q. I want to correct that; it was $479.69 that was testified to by Mr. Markey; so that it was the difference between $476.69 and $635.59 that you kept?—A. That's right.

73 Q. As your—as your what?—A. As my commission. That was the agreement I made with my brother.

Q. Now, the shipment that was made on February the 2nd, 1944, B. & O. car 38,562 calls for an invoice payment of $505.44. Did you receive that actual amount from Mr. Carrano?—A. Yes, sir.

Q. And the shipment on Pennsylvania car 92,203 calls for invoice payment of $461.16. Did you receive that amount from Mr. Carrano?—A. Yes; with one explanation that adjustments were made on every one of these cars.

Q. We are going to get to that. $461.16 is the amount that you made?—A. Probably it is because that is my invoice.

Q. And the fourth one, $812.07?—A. Yes, sir.

Q. And the fifth, $603.36. All right. Now, which one, Mr. Bruno, was an adjustment made on?—A. Which one? I wouldn't know unless I would look at the debit memo. I don't know. I believe, sir, that that is not the only debit memos.

Q. These are the only ones we have got now.—A. Yes.

Q. Based on your reference to this or anything else, including your books and records, tell us on which of those particular shipments a downward adjustment was made because of the mill find-

ing there had been a misgrading?—A. Well, if the car numbers on these—I will pick them out for you. Here is one of them.

Q. Now, wait a minute—"There is one of them"—won't tell us anything. Which one is it?—A. C. B. Q. 25,293.

Q. That is invoice marked G-8 in evidence. That is one of them.—A. Seems to be one of these cars; not on here, I don't know; I may be wrong.

Q. Could that be because there was no debit memo issued on it?—A. That is something I cannot say, sir.

74 Q. I am asking you to refer to anything that is available to you for the purpose of telling us which of those five shipments became subject to a downward adjustment. What do you mean when you lay the Exhibit G-3 to one side; do you find it or don't you?—A. I don't say I am right, I don't know, I may be wrong.

Q. Well, let's try not to be, though; I mean let's try not to be wrong.—A. Suppose I am not smart enough to figure out. I am trying my best to find it.

Q. All right.—A. This is one of them.

Q. What do you mean by that? This is Exhibit G-1, C. B. Q. 22,160; that was subject to downward adjustment on a debit memo, right?—A. Probably was. B. & O. here. I don't see this one—I don't see the others. I believe some are missing.

Q. I will help you. Here, this is Exhibit G-3, Pennsylvania 92,203; that is represented by this one, isn't it.—A. Well, I missed that.

Q. All right, I found it for you. We are all right. So that there are three that were subject to a downward adjustment on debit memos; is that right?—A. Yes.

Q. Now, let's take a look at that. This first shipment here was designated for railroad car number Pennsylvania 92,203 on March the 30th, 1944. Can you explain why it was that the debit memo was issued on April the 13th, 1944, two weeks later or three weeks later?—A. Probably that's the time Mr. Carrano got the report from the mill.

Q. As to C. B. Q. 22,160, dated March the 31st, 1944, can you tell us how that happened to come through by debit memo on the same day as the other?—A. That's the time I got from Carrano.

Q. What I am getting at, Mr. Bruno, is this. Between the time you made those shipments and the time you were issued the

75 debit memo, you were visited by the Office of Price Administration agents, were you not?—A. I believe I was.

Q. And as a matter of fact, you communicated with Mr. Carrano or he with you, and you then learned that he had been contacted by the Office of Price Administration agents, didn't you?—

A. The only time Mr. Carrano talked to me when he got these debit bills on my cars.

Q. And as a matter of fact, it was after the visit of the Office of Price Administration that all three of these readjustments were made; isn't that right?—A. Probably it is, I don't know. That's the time I got them from Carrano.

Q. And directing your attention specifically to the other two, there was no downward adjustment made as to these shipments, was there?—A. I wouldn't say no, because probably some more memos.

Q. Well, I will take that answer. Have you ever had a downward adjustment debit against you for a misgrading of paper?—A. Yes, sir.

Q. By Carrano?—A. By Carrano; yes.

Q. And the one invoice that I just showed you that you said was paid in the sum of $505.44 was actually entered by you in the books for $379.08; and that was on March the 10th, 1944; you kept the difference?—A. Yes, sir; probably did, I am not sure now.

Q. And on March the 1st, 1944, an entry of $603.36, as represented by the invoice, was actually entered in your ledger at $452.52, making a difference of $155. You kept the difference there?—A. Probably; yes.

Q. And on March the 21st an invoice, amount of $812.07 was entered in your ledger at $609.06, which makes a difference of about $203. You kept the difference there?—A. Probably so; yes.

Q. And as to that invoice which shows a payment made of $635.59, you entered it in the ledger as $476.69.

76 Mr. SOMMER. I object to that question; the invoice doesn't show a payment made.

The COURT. No; the invoice shows a charge made.

Mr. ROSSBACH. All right, I am sorry. I am probably not as grammatical as Mr. Sommer would like me to be.

The COURT. No; he is not objecting to your grammar, he is objecting to your accuracy.

Q. (Continuing.) That the $635.59, as shown on the invoice which you admitted was paid to you, was actually put in the ledger by you at $476.69, was it not?—A. Probably was.

Q. And you kept the difference there?—A. Probably so.

Q. And again, the item of $461.16, represented by that invoice and which you say Carrano paid to you, was entered in the ledger by you at $345.89 and you kept the difference there?—A. Probably so; yes.

Q. Now, Mr. Bruno, you have identified some purchase orders here, and I am particularly referring to that which has been marked in evidence as "Exhibit D-1." Now, let's take a look at

that. You have, first of all, the purchase order issued by James Carrano to you for the purchase of material?—A. That's right.

Q. And the first order is for 5 cars of waste paper, the quality to be of assorted kraft, mixed paper, news, over-issue news, P. S. #1, soft brown kraft, kraft-back waste, and #1 Column Ledgers, #1 White Ledgers—I guess that's colored ledgers—and #1 Old Corrugated Containers. Now, each one of those categories represented different grades of waste paper, did they not?—A. Probably did.

Q. Well, now, does assorted kraft mean anything different to you?—A. Pardon me. You asked——

77 Q. Does corrugated—— A. Pardon me. You mean each one of those orders?

Q. No, I mean each one of these classifications: Assorted Kraft, Mixed Papers, Overissue News, News, Colored Ledgers, White Ledgers—they all represent different grades of waste paper?—A. That's right, on this particular order.

Q. All calling for different maximum prices?—A. That's right.

Q. But you in the process of your operation wouldn't concern yourself with that; you just bulked them together, you threw them all on a freight car till the freight car was packed nd then billed them all as assorted kraft and let somebody else do the separating?—A. Not exactly all grade; a couple of grade we did.

Q. All right. But before you said that is what you did, and those bills show you did; you just listed it assorted kraft, and let the fellow on the other end do the work.—A. On account we ain't got the weight.

Q. Referring to the second sheet, we have a definite order from Carrano to you for #1 Assorted Kraft five cars. That is what he wanted; right?—A. Yes.

Q. And you knew that is what he wanted when he ordered this?—A. That's right.

Q. And he also stipulated the price to be the ceiling price plus a dollar for handling, that is for loading?—A. Yes.

Q. And he also said that the cars had to be loaded in accordance with the ODT regulations?—A. That's right.

Q. You knew about those too?—A. Yes, sir.

Q. So that, in your attempt to fill this order, you then supplied him with some waste paper, did you not?—A. That's right.

Q. And you issued an invoice to him representing the amount you shipped under this order, and on your order number B-9531; right?—A. Probably is.

78 Q. And that invoice took this form, did it not?—A. That's right I guess.

Q. Well, now, take a look. Let's be sure of some part of what we are doing.—A. This car is not marked on this one.

Q. I am referring you now to the order number, the order number marked on here, and asking you whether this invoice represents a shipment under this purchase order?—A. Very difficult for me to classify; first thing, I didn't write this.

Q. You identify those sheets?—A. As orders, but not those numbers I said.

Q. It was explained to the Court when they went in evidence that those numbers represent your numbers.

Mr. SOMMER. But he has said what he thinks they are.

A. I did not check these pencil numbers, because I did not write these down, but this is the order that I got from Carrano. In other words——

Q. And does this invoice represent—— A. Probably represents one car of those five cars.

Q. Can you tell me whether it does or does not?—A. I guess it does, because I sent the bill in.

Q. And on that invoice you conformed the invoice with the order number insofar as it describes the type or grade of waste paper that you were shipping, did you not?—A. That's right.

Q. You put down "Assorted Kraft"?—A. #1 Assorted Kraft.

Q. And on that shipment you shipped 25,635 pounds of what you said was assorted kraft, and charged $1.75 per hundredweight.—A. All right.

79 Mr. ROSSBACH. I ask that the invoice just referred to be marked for identification.

(Marked "G–15" for Identification.)

Q. All right. Now, going down there on that same order, there is indicated on this purchase order a bill number 9541, and I show you an invoice and ask you whether that is an invoice which represents a shipment made by you to Carrano acting on that purchase order?—A. I wouldn't know, sir, because this number—it is not on here; it is quite different on this order number, so it might be, maybe not.

Q. Is there anything to identify this shipment represented on this invoice as coming within this purchase order?—A. I wouldn't be able to say that, because I haven't got anything marked here that represents this bill. Could be. Could be one of the bills invoiced.

Mr. ROSSBACH. I ask that this be marked for identification.

(Paper marked "G–16" for Identification.)

Q. There appears also bill number 9576. Can you tell me whether that invoice represents a shipment?—A. Could be, the same date.

Mr. ROSSBACH. I ask this be marked for identification.

(Marked "Exhibit G–17" for Identification.)

Q. As to B-9644—Let's skip that one—As to B-9645, your answer is the same as to this invoice?—A. Yes.

Mr. Rossbach. I ask that this be marked for identification.

(Marked "Exhibit G-18" for Identification.)

80 Q. Now, refer to the next purchase order please. There we have order dated January 20, 1944, addressed to you by Mr. Carrano calling for three cars, the quality of the waste paper to be assorted kraft and mixed papers, right? So that there we have a bill number 9246. Can you identify that as being within that same answer? It wouldn't help you if you looked at these things, would it?—A. No, it won't help me at all.

Mr. Rossbach. I ask it be marked for identification.

(Marked "Exhibit G-19" for Identification.)

Q. And as to bill number 9305—I haven't got that one. This last one, B-9325, this invoice is dated February the 12th, 1944. Can you tell me whether that represents a shipment coming within that purchase order?—A. There is no order number.

The Court. Who made these pencil notations on these orders from Carrano to you?

The Witness. Probably Mr. Carrano.

Mr. Sommer. Your Honor please, those are from Carrano's files and produced by Carrano.

The Court. Well you offered them.

Mr. Sommer. Yes. They were produced by Carrano yesterday as records of his, and I believe these other bills are photostatic copies of bills in the records of Carrano with notations on them by Carrano.

The Court. They are photostatic copies of Bruno's invoices.

Mr. Sommer. Bruno's invoices to Carrano.

The Court. Which bear the same numbers as those which are contained on the orders from Carrano to Bruno?

81 Mr. Sommer. Correct; and those are taken from Carrano's files as well. In other words, all these papers are from Carrano's files with Carrano's notations on them.

The Court. And you have produced them as part of your defense?

Mr. Sommer. That's right, as the copies of the orders from Carrano.

Mr. Rossbach. I ask that this be marked for identification.

(Marked "Exhibit G-20" for identification.)

Q. Now, referring to the last of this series of purchase orders we find a quantity order for five cars of assorted kraft with the legend "You may include #1 Mixed Papers," right?—A. Yes.

Q. And that order is dated February the 11th, 1944, calls for immediate delivery, and I show you an invoice bearing the number B-9364, dated February the 17th, 1944, and ask you whether

that includes the shipment under that purchase order?—A. Those are not my papers. I wouldn't be able to say that.

Mr. Rossbach. I ask that this be marked for identification.

(The paper is marked "Exhibit G-21" for identification.)

Q. Here is one——

The Court. Look now, how long are we going to be on these things?

Mr. Rossbach. One, two, three, four more.

The Court. Show them to him altogether.

82 A. I mean, those are all Carrano's bills and notations; I wouldn't know anything about it.

Q. Here are three more.

The Court. Look over those three; see if you know anything about them.

The Witness. No, sir.

The Court. You don't know whether they correspond or not?

The Witness. No.

Mr. Rossbach. I ask that they be marked for identification.

(Marked "Exhibit G-22-23-24" for identification.)

Q. Now, Mr. Bruno, on this invoice issued by you on March the 15th, 1944, you have listed No. 1 Assorted Kraft, 18,595 pounds at $1.75 per hundredweight?—A. Yes.

Q. And then you have No. 1 News, 3,760 pounds at 75¢ per hundredweight?—A. Yes, sir.

Q. How did you weigh and determine the one-hundredweights of each grade of newspaper with respect to that particular shipment?—A. Well, we have a lot of small customers that weight up their own bales. They mark the bales on the side.

Q. This is a shipment made to Carrano.—A. That's right.

Q. (Continuing.) Under a purchase order?—A. That's right.

Q. In that particular case you did weight the news and the assorted kraft?—A. The news was weighed when it come in my plant with the weight on the side of the bale.

Q. And here on the bill of February 2d, 1944, you have 28,065 pounds of assorted kraft, 40,965 of assorted kraft and 4,010 pounds of Triple Assorted Kraft?—A. That's right.

83 Q. In that particular case you distinguished between the grades again.—A. That Triple Asorted Kraft was picked up in Paterson, I can tell you right where I picked it up—it was picked up in Paterson, weighed on the Paterson scale and I knew just what it was.

Q. So that in those instances there was a separation of the items on your bills?—A. That 4,000 pounds probably was rolls of new kraft paper.

Q. Do you remember, Mr. Bruno, of any debit memo that was issued against you by Carrano with respect to any one of the ship-

ments of waste paper indicated on any of these invoices that I have just shown you?—A. I wouldn't know right offhand.

Q. Do you recall anything, or can you refer to anything that would give you some recollection of it?—A. No.

Q. And was the shipment that you made under these invoices and represented by them actually assorted kraft?—A. Well, probably was something else in there.

Q. Then wouldn't it be likely that upon an inspection by the mill you would get a debit report?

The COURT. Don't argue with the witness whether it would be likely or not. I mean, under his statement, he would have if he followed out his ordinary procedure.

Q. And yet you have no recollection of having received such a debit memo on this shipment. You remember seeing Mr. Markey up at your place of business, do you not?—A. Yes, sir.

Q. And having discussed with him the manner in which you kept your books?—A. I believe I did.

Q. Did you tell him that you had possibly, as you say now, received a debit memo on these shipments prior to the time he came?—A. Probably he didn't even ask me, sir.

84 Q. You don't remember him asking you?—A. No, sir.

Q. But you did tell him that the difference between the entry in your ledger and the amount shown on the invoices and actually received, represented additional commissions due you?—A. I don't know if I called it commission. I made him understand that was my share, yes.

Q. You also remember communicating with the OPA through or with your then attorney, Mr. Matthew Krafte, who is sitting next to Mr. Sommer?—A. Communicating with the OPA? No, sir.

Q. You don't remember discussing those items with the OPA.—A. No, sir. In my office? Yes, Mr. Markey and the other agent over there, Mr. Sewell, I give them all the cooperation they wanted.

Q. And through your lawyer Mr. Krafte?—A. No, sir.

Q. I have nothing further.

Mr. SOMMER. All right. We will rest.

The COURT. Now, until 2 o'clock, ladies and gentlemen of the jury, you will be excused because I have a matter to attend to which will take me about 20 minutes, so you will have the benefit of that extra 20 minutes. Recess until 2 o'clock.

(Noon recess.)

85 AFTERNOON SESSION

LOUIS BRUNO resumed the stand.

The COURT. All right, proceed.

Mr. ROSSBACH. I said I was through.

Re-direct examination by Mr. SOMMER:

Q. Mr. Bruno, when Mr. Markey and Mr. Sewell from the OPA came to your place of business, did you permit them to go through your books?—A. Yes, sir.

Q. And make a complete analysis of your books?—A. Yes, sir.

Q. Mr. Krafte is still your lawyer, isn't he?—A. Yes, sir.

Q. And did you ever have a conference with Mr. Markey and Mr. Sewell and Mr. Krafte together?—A. No, sir.

Q. Did you ever have a conference with Mr. Krafte and another agent of the OPA?—A. No, sir.

Q. When this readjustment came through on the prices, did you and your brother readjust your figures as well?—A. Yes, sir.

Q. That's all.

Mr. ROSSBACH. No questions.

JOSEPH V. CARRANO, recalled, testified on behalf of the defendant, as follows:

Direct examination by Mr. SOMMER:

Q. Mr. Carrano, I show you D-1 and D-2 and upon them there appear certain figures in pencil. Do you know in whose handwriting those figures are?—A. Yes, sir.

86 Q. Whose handwriting are they in?—A. My bookkeeper.

Q. And where did those two exhibits come from?—. A. Came from our file.

Q. Now, I show you G-1-3-5-7-8. Those are photostatic copies are they not, of invoices that were taken from your files?—A. Yes, sir.

Q. And upon those there appear to be pencil notations with numbers similar to the numbers upon D-1 and D-2. In whose handwriting are those figures?—A. Also from our bookkeeper.

Q. Now, would there be any way for Mr. Bruno to know anything about those figures?

Mr. ROSSBACH. I object to that. I don't see how it becomes material as to whether there was any way for these defendants to know something.

The COURT. How would he know whether there was or not?

Q. Let me put it to him this way. I withdraw that question. Did Mr. Bruno ever see those figures?—A. No, sir.

The COURT. Not to your knowledge.

The WITNESS. Well, I am positive. Those are our records. The only time he saw them was now, here at the court.

The COURT. How do you know that?

The WITNESS. Because I know our records are kept——

The COURT. Do you have them in your own personal possession all the time; to your knowledge you know he hasn't seen them?

The WITNESS. Yes, sir.

Q. That's all.

87 Cross examination by Mr. ROSSBACH:

Q. Mr. Carrano, I show you what have been marked for identification as Exhibits G-15 to G-24 inclusive, being invoices on the stationery of the T. Bruno Paper Stock directed to your concern, and then I direct your attention to the purchase order which has been marked in evidence as Exhibit D-1 and ask you to compare the items on those invoices with the items on the purchase order and tell us, if you can, whether these items on the invoices are items delivered under your purchase—under that purchase order?

Mr. SOMMER. I object to that as not being within the scope of the direct examination of this witness.

The COURT. Are they his records?

Mr. ROSSBACH. These have just been identified as his and his pencil marks on them.

The COURT. What is your question now?

Mr. ROSSBACH. Whether the items on these invoices are items which are included in the delivery under these purchase orders.

Mr. SOMMER. I have no objection to it provided he makes Mr. Carrano his own witness.

The COURT. No; I think it will be proper as cross-examination, because you have asked about these records.

Mr. SOMMER. I asked about one particular record.

The COURT. I think I will allow it in the general scope of cross-examination.

A. Want me to look at them?

Q. Yes.—A. These one, two, three, four invoices apply to our order number 3937; they were shipments that were made against this order.

88 Q. And the items as shown on there supposedly corresponded with the items purchased on the purchase order, do they not?—A. According to the——

Q. And were charged accordingly on these bills?—A. That's right, sir.

Q. Charged to you?—A. Yes, sir.

Q. And were they paid by you?—A. Yes, sir.

Q. In the amounts as shown on these bills?—A. On the invoices; yes, sir.

Q. Go ahead as to the other.—A. On our order 9871, this one shipment applies to that order.

Q. That is B-9325?—A. Yes.

Q. How about this one?—A. That is B-9245, yes; that's right. There is one there and this applies——

Q. These two apply to that order?—A. Yes, sir.

Q. And did you pay the amounts as shown on the invoices in those cases?—A. Yes, sir.

Q. All right, go on.—A. Against our order number 3908, those invoices were shipped.

Q. And there are four of those?—A. Four of those; yes, sir.

Q. And in each case you paid the amount as shown on the invoices?—A. Yes, sir.

Q. Now, sir, with relation to these last four invoices, and as compared with the purchase order, you ordered on this purchase order assorted kraft, did you not?—A. Yes, sir.

Q. And then gave the permissive statement, "You may include #1 Mixed Papers."?—A. Yes, sir.

Q. Now, was it your practice with Mr. Bruno that where you ordered assorted kraft, that he was privileged to sell you some other type of paper, but nevertheless would list it as assorted kraft on his invoice to you? Did you have such an arrangement with him?—A. Well, no, sir; we didn't have any arrangement.

89 Q. Well, that's all. That's all I want to know.

The COURT. Now I think you have gone about as far as my broad extension of the limits of cross-examination will go. If you want to call him in rebuttal you may do so.

Mr. ROSSBACH. Nothing further.

Mr. SOMMER. Nothing further from this witness.

MATTHEW KRAFTE, called and sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. SOMMER:

Q. Mr. Krafte, you are a member of the bar of the State of New Jersey?—A. I am.

Q. And you are Mr. Bruno's counsel?—A. I am.

Q. Was there ever a conference between Mr. Bruno and any representative of the O. P. A.?—A. No, sir.

Q. Did you personally have a conference with Mr. Sewell and Mr. Markey?—A. Yes, sir.

Q. How many conferences did you have with them?—A. Two.

Q. That's all.

Cross examination by Mr. ROSSBACH:

Q. Were they right in your office?—A. At my office, once the first time, and the second time at the O. P. A. office. I think that is in what is known as the Aetna Building, Aetna Life Insurance Company Building in Newark.

Q. And was that as a result of Mr. Bruno's notifying you that

he had been contacted by them?—A. That was the result of Mr. Bruno retaining me.

Q. You want to put it your way?—A. No; I don't.

90 Q. All right. But I mean Mr. Bruno contacted you didn't he?

The COURT. Mr. Bruno got in touch with him.

Q. Yes, sir. Mr. Bruno got in touch with you and told you that the OPA had been to see him?—A. Yes, sir.

Q. That's all.

Mr. SOMMER. We rest.

Mr. ROSSBACH. I would like to offer some rebuttal, if your Honor please.

The COURT. All right.

JOSEPH V. CARRANO, recalled, in rebuttal, on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Q. Mr. Carrano, I have previously shown you these exhibits which have been marked G–15 to G–24 inclusive. I now show you a group of invoices purportedly issued by your company to the Taggart Corporation. Will you just run through those, please, and tell us whether they correspond to the invoices previously marked for identification?—A. Yes, they do.

Q. All right, sir. Now, they represent purchases by you from Bruno and by you in turn sold to the Taggart Corporation, do they not?—A. Yes, sir.

Mr. ROSSBACH. At this time I offer them in evidence.

Mr. SOMMER. Objected to as irrelevant and immaterial, having nothing to do with the issue here.

91 Mr. ROSSBACH. Your Honor please, they all relate to the very evidence which was admitted in evidence by——

The COURT. They all relate to the numbers on the paper introduced by Mr. Sommer?

Mr. ROSSBACH. That's right, sir.

The COURT. They may be received and marked in evidence. Mark them as one exhibit.

(Received and marked "Exhibit G–25" in evidence.)

Q. Now, Mr. Carrano, with relation to those particular items that you have just identified, is there anything in your records, or do you have any recollection of any one of those transactions being subject to a downward adjustment because you received notice that there was an item of mis-grading on them?—A. Well, I cannot answer that truthfully because I don't have the records.

Q. Well, you were asked to bring your records as they related to the sales and purchases of waste paper from Mr.——

The COURT. Did you have any other downward adjustments in your dealings with this man?

The WITNESS. Oh, yes.

The COURT. Wait a minute; in the last six months?

The WITNESS. Oh, yes, sir.

The COURT. Of the same type as this?

The WITNESS. I don't know whether it relates to any of these shipments.

The COURT. I am talking about the case of misgrading of paper such as existed here.

The WITNESS. Well, I cannot honestly truthfully say, but there have been times in the past, previous to this shipment where
92 he has received debits for inferior stock which is misgrading. Now, whether it is the actual two grades involved or not, I cannot answer truthfully.

The COURT. Since ceilings were set on paper?

The WITNESS. Yes, sir.

Q. And was that as a result of your getting information from the Taggart Corporation?—A. From the consignees; yes.

Q. No, no; I am talking about anything that you did. You debited Mr. Bruno because you got some information, not from any consignee, but from the Taggart Corporation.

The COURT. Most of these refer to the Taggart Corporation?

Mr. ROSSBACH. They are all the Taggart Corporation.

A. I cannot answer that without my records.

Q. But in answer to Judge Meaney's question you said that there were occasions when there was evidence of a misgrading?—A. Yes; but whether——

Q. All right. Now, do you apply that answer to those invoices that were directed to the Taggart Corporation?—A. I cannot apply them to any particular invoice at this time, because I don't have the records.

Q. To the best of your recollection did you ever receive word from the Taggart Corporation that there had been a misgrading as a result of which you gave Bruno a debit?—A. I cannot answer that. We get so many of those things that I don't know specifically whether he was involved in any of them.

Q. Well, if you had——

The COURT. Well, do you pay, ordinarily do you pay on the invoice?

93 The WITNESS. Yes, sir.

The COURT. As soon as you receive it?

The WITNESS. Yes, sir.

The COURT. You don't wait for the notification of the grading?

The WITNESS. No; we don't.

The COURT. Not in any instance?

The WITNESS. Well, in some instances where we do business with a man for the first time, we don't know him very well, we won't pay him the full amount of the invoice; we will only pay 75 percent and wait for the mill report to come in. But with people we are doing business with right along, why, we pay him in full.

Q. Nothing further.

Cross-examination by Mr. SOMMER:

Q. Mr. Carrano, you never see any of the paper, do you?—A. No, sir.

Q. And when it gets to the mill it is there inspected, is it not?—A. Yes, sir. I imagine so.

Q. And you don't make adjustments unless the mill informs you that the paper is not according to invoice, do you?—A. Yes, sir.

Q. And in every instance where the mill informs you that the paper is not according to invoice they pay you according to what they find and then you adjust with the dealer?—A. That's right.

Q. That's all.

The COURT. Do you have any method of checking up on their report, or do you just take the mill's word?

94 The WITNESS. Well, we usually take the mill's word. Sometimes we doubt their word or the shipper doubts their word and we either go out there with the packer or investigate for ourselves.

JOHN MARKEY, recalled in rebuttal on behalf of the Government, testified as follows:

Direct examination by Mr. ROSSBACH:

Q. Mr. Markey, you examined the books of the Bruno Paper Stock Company?—A. Yes, sir.

Q. And was your attention specifically directed to those items which might be items of debit?—A. Yes, sir.

Q. In your examination of the books of the T. Bruno Paper Stock Company, did you find any item contained in those books or records to indicate a debit adjustment charge against him by Carrano prior to the date of your inspection?—A. No, sir.

Q. Did you find anything in there to indicate an adjustment of any kind by reason of a misgrading of the paper?—A. No, sir.

Q. Nothing further.

Cross-examination by Mr. SOMMER:

Q. Did you look for it?—A. No, sir.

Q. That's all.

The COURT. If it were there, would your examination have shown it?

The WITNESS. Yes, sir.

Mr. ROSSBACH. Nothing further.

95 By Mr. SOMMER:

Q. Did you examine the check book?—A. No, sir.

Q. Did you examine the payment of the accounts receivable?—A. We examined the ledger under Carrano's name which showed the cash payments as well as the amount debited.

Q. And showed a list of debits unpaid, did it not?—A. It showed cash payments and debits; yes.

Q. Unpaid debits.—A. Yes.

Q. That's all.

Mr. ROSSBACH. Now, if your Honor please I have to rely upon the judgment of the Court in this matter. We have had Mr. Tice from the Taggart Corporation on his way for the last several hours. I did not know that this was going to take the turn of events that it took by virtue of the evidence which was admitted. We need Mr. Tice now for the purpose of identifying the records of the Taggart Corporation, the freight orders in particular, based upon the inspection of these very loads of waste paper.

The COURT. What papers?

Mr. ROSSBACH. Well, maybe Mr. Sommer will admit that they are photostatic copies of the record.

Mr. SOMMER. I will admit that these are photostatic copies of some papers from the files of the Taggart Corporation, but I won't admit their accuracy or I won't admit the fact that they are the results of any inspection or anything else and would object to them going in without being proven as being the actual records made by the person whose name is signed to them.

96 The COURT. Do you admit that they are photographic reproductions of parts of the records of the Company?

Mr. SOMMER. Yes; as far as that goes, that I will admit.

Mr. ROSSBACH. I offer them on that basis.

The COURT. That's all Tice could testify to.

Mr. SOMMER. They were not made by Tice nor made under his supervision.

The COURT. No; but they are part of the official records of the Company, and as such would be admissible as proof of what they allege or purport to present.

Mr. ROSSBACH. And at least, sir, in part made by a man who is now described as dead.

The COURT. Well, that is neither here nor there.

Mr. SOMMER. They wouldn't be admissible as official records because they are not official records.

The COURT. They are admissible as part of the records of the Company, and they would be admissible to prove the subject matter which they contain and would have only such weight as is indicated by that, without the further supporting proof that

they were made by the people by whom they purported to have been made.

Mr. SOMMER. I say that, they being offered for the purpose of proving what is written on them, and there being no one to prove that they were made under their supervision, that they are not admissible.

The COURT. They would be admissible as part of the records, Mr. Sommer, of the Company and would be admitted to prove the contents of the documents as part of the generally regularly kept record of the Company.

97 Mr. SOMMER. Unfortunately I know of no rule, your Honor, that says that every paper in the possession of a company——

The COURT. No; any paper which is part of the regularly kept records of the Company would be admissible. Now, if you are willing to admit that these are a part of the regularly kept records of the Company, all right. If you don't admit it, Mr. Rossbach will be put to his proof. If you admit that they are part of the regularly kept records of the Company I rule that they would be admissible.

Mr. SOMMER. All I can admit——

The COURT. Under the general statutory provision.

Mr. SOMMER. All that I can admit is that they are apparently photostatic copies of papers taken from the files of the Taggart Company.

The COURT. Part of the regular files of the Company?

Mr. SOMMER. That I know nothing about, but they are on stationery of the Taggart Company.

The COURT. No; don't let's quibble. Now, are you satisfied to admit that they are part of the regularly kept records of this Company, photostatic copies?

Mr. SOMMER. I am satisfied to admit that they are photostatic copies.

The COURT. Yes or no to my question, Mr. Sommer.

Mr. SOMMER. No; because I don't——

The COURT. That is categoric. How long will it take Mr. Tice to get here?

Mr. ROSSBACH. He is confronted with travel problems; he is only coming from New York. He should be here momentarily.

98 The COURT. New York City?

Mr. ROSSBACH. Yes, sir.

The COURT. What part of New York City is he coming from?

The WITNESS. 230 Park Avenue, and the office said about an hour ago that he was on his way.

The COURT. We will recess anyway for five or ten minutes.

(A short recess was taken.)

Mr. ROSSBACH. The Government rests.

The COURT. Mr. Tice is not here?

Mr. ROSSBACH. No, sir.

Mr. SOMMER. I have a motion I would like to make, your Honor please, in the absence of the jury.

(The jury withdrew.)

Motion for directed verdict

Mr. SOMMER. At this time, if your Honor please, on behalf of the defendant, I move for a directed verdict of not guilty on all of the counts of the indictment upon the same grounds as I stated at the end of the Government's case and ask that my remarks then be incorporated the same as if given in full length at the present time. And further, insofar as the three counts of the indictment are concerned, namely counts 1, 2 and 5, the evidence, insofar as those counts are concerned is that the mills reported that the merchandise contained in the car was not the same as the invoice and an adjustment of price was made covering those three cars, in accordance with the agreement that existed at the time the order was given. Therefore, insofar as those three cars are concerned, and those three counts of the indictment, there is no proof whatsoever before this Court that there was anything paid over and above the ceiling.

99 Insofar as the other two counts are concerned, those referred to in counts 3 and 4, though there is in evidence a freight slip that contains on it the word "corrugated" the Taggart Corporation was satisfied that the merchandise was the same as set forth in the invoice.

The COURT. I think that while I am not conclusively and absolutely without question convinced of the solidity of the Government's case, I do think it is a question of fact on all five of the shipments and I shall deny the motion.

Mr. SOMMER. I pray an exception.

(Which exception is hereby allowed and sealed accordingly.)

[SEALED] THOMAS F. MEANEY.

(Proceedings resumed in presence of the jury.)

Mr. Sommers summed up on behalf of the defendant.

Mr. Rossbach summed up on behalf of the Government.

Charge of the court

Ladies and gentlemen of the jury:

An information has been filed in this district against Louis Bruno charging him, in effect, with selling certain types of paper over the ceiling price which is established by law.

The mere fact that this information has been returned, of
100 course, is not to be considered by you as proof in any way of the fact that he was guilty of what is charged in the information, because an information or an indictment is not proof of the charge which is made, but it is simply a recital of an accusation which is made against a certain individual.

The information, as I say, alleges that this defendant Louis Bruno sold paper to a broker for a price which exceeded the legal limit set for that particular type of paper. The paper was later forwarded to a mill in New York and some of the other paper was forwarded to a mill in Ohio.

The Government contends that this sale was made by the defendant knowingly, and that he intended to charge and receive a price in excess of that allowed by law which is a violation of the regulation established in accordance with congressional basic authority.

The defendant denies that charge and says that he did sell certain paper, but that he sold it as it was ordinarily sold in the course of the trade, and that despite what the invoice might have said was the price and was the character of the paper sold, the sale really was guided by other considerations, namely the price to be fixed by the establishment of the amount and quality of the paper, as it would be determined on receipt of the paper by the ultimate designated recipients of it. He says in this particular case that he did charge a certain price which was in excess of that which he would have been entitled to charge if he had charged the ceiling prices for the paper actually sent, but that that was adjusted by a debit which was sent him by the man to whom he originally sold the paper.

If that be true, of course, and if he did not sell it with the intent of receiving higher than ceiling price, and did not actually receive higher than ceiling price, there could be no conviction: because the charge is that he actually sold it and intended to receive higher than ceiling price and did receive higher than ceiling price.
101 The Government contends that this debit arrangement was just an afterthought which occurred when he found out that he was found out; and that the debit was not made until after such time as the OPA agent had, at the factory, determined the difference between the alleged quality of the paper and the actual quality of the paper, the actual quality being far beneath in price that which was allegedly sent.

Now, you will recall all the evidence. You will recall that he said that he didn't know what was sent, but he expected to rely on the examination made at the factory. You will recall that one of the cars contained only 400 pounds out of 25,000 pounds of the type of paper which he was supposed to have sent and for which he sent an invoice, and for which he received payment, although he alleges that later there was this correction made. Out of the whole questions of fact you must arrive at that point where you will be able to say to yourself that the evidence indicates that such and such is the truth; and you must determine the truth out of all this evidence.

You are to say what credence you will give to any of the testimony; you are to say what weight it will have, and out of the whole mass of testimony and evidence which has been produced here you must determine the truth and you mustn't guess or speculate about the thing; and you mustn't say, "Well, it could possibly be so." You must find out the truth after considering and comparing all of the evidence.

In your considerations you must remember that this defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and that the burden of proving his guilt beyond a reasonable doubt is upon the Government and that burden never shifts. The defendant does not have to prove himself innocent,
102 because in our system of government he is presumed to be innocent. Anybody can hurl a charge, but if the charge is made the person making that charge should be burdened with proving it. And that is perfectly logical, and because it is logical and fair and just, our founding fathers adopted that as a prime part of our jurisprudence. So therefore this defendant does not have to prove his innocence. The Government, throughout the whole trial, has the burden of proving the guilt of the accused beyond a reasonable doubt.

Now, a reasonable doubt simply means an indecision which is begotten in a human mind functioning normally and rationally, functioning as it does in the ordinary conduct of the business of its possessor, from a consideration of the evidence. If the evidence begets in your mind a reasonable doubt as to the guilt of the accused, that doubt must be resolved in his favor; and resolution of the doubt in his favor means a verdict of not guilty. But he is entitled to the benefit only of a reasonable doubt; he is not entitled to the benefit of some hazy, remote or fantastic doubt that could conceivably be entertained or which might be begotten of the unwillingness to convict a fellow human being, even though you were satisfied beyond a reasonable doubt of his guilt; and it is not a doubt that would be begotten by fear that you might conceivably make a mistake. So that if you have a

reasonable doubt, resolve it in favor of the defendant, but that is the only kind of doubt which must so be resolved.

The evidence in this case, of course, is circumstantial and circumstantial evidence is valid evidence. In order to be effective it must establish an unbroken chain of facts which lead you necessarily to draw the conclusion of guilt. If, from consideration of the evidence an hypothesis may be formed which would be consistent with a theory of guilt and a theory of innocence, why, then the defendant is entitled to your verdict of not guilty. But if circumstantial evidence leads you to the unassailable and
103 unalterable conviction that this defendant has been proven guilty beyond a reasonable doubt and the only theory that can be based upon that evidence is a theory consistent with guilt and inconsistent with innocence, then of course your verdict in turn must be a verdict of guilty.

As I say, this must not be the result of speculation or conjecture or guess work. You must weigh the evidence and determine the truth, and then to that truth as you determine it, you must apply the law as I give it to you. And if, in the course of the trial, the court or either counsel has attempted to recall evidence, and that differs from your recollection, it is your recollection that must prevail, and not anybody else's. And if, during the trial, the court has ruled on objections made by counsel for the defendant, that ruling was made purely on questions of law with which you were not to be concerned, and must not in any way be taken by you as an indication of how the court feels about the guilt of the accused, because it doesn't matter how I feel about it; you are to pass on the question of his guilt or innocence after you follow out the directions which I give you.

You must not be affected in this case by any bias or prejudice or sympathy which might have been begotten in your mind by anything at all, because you are not to give sympathy verdicts or prejudice verdicts; you are to give just verdicts.

This is an important case. Just because it is concerned with waste paper—it is not a question of doing somebody out of some money. That is not the basis of the trial; the basis is the violation of a regulation which has been established in an attempt to stabilize the economic structure of America, so that under the pressure begotten by war there may not be begotten runaway prices. The fact that somebody may have tried to get money from somebody else—it is not the ordinary case of theft, it is a case of a violation of a regulation established in order to try to keep
104 the economic basis of our life normally fixed so that there won't be any ruinous cost of living for the people of America.

The defendant has asked me to give you a definition of reasonable doubt, and since it coincides with a definition which was officially arrived at after much cerebration by the Court of Errors and Appeals of New Jersey, I think possibly I might adopt the language of that exalted Court and tell you that "It is that state of the case, which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

I consider that to be exalted and high class language for what I have tried to say in simplified terms; not that I had any thought that you might not apprehend the significance of the exalted language, but we speak in common terms.

Of course, when you go to the jury room you must not go there with a mind fixed and determined, come what may; you must go in there with an open mind and discuss the evidence with your fellow jurors; because you are twelve peers of this defendant, selected to pass upon questions of fact and determine his guilt or innocence, and therefore it is part of your function to consult with the others who have been selected with you to act as his final operation of government in this particular instance for this defendant. And in order to convict a unanimous verdict and not a majority verdict is required. You must all agree in order that you may return a verdict of guilty or not guilty. If you cannot agree, if after consideration of the evidence and weighing it and discussing it with your fellow-jurors, your consciences operate and you arrive at a certain determination, than that must remain your determination; and it is a perfectly possible and proper situation that there may be a condition existing where jurors cannot agree unanimously; that is a possible eventuality. But before you can return a verdict there must be a unanimous agreement.

105

You will, of course, weigh the evidence as to each count separately, and you will pass on each count separately. If you were to come back with a general verdict of guilty, it would mean guilty as charged, guilty of all counts in the indictment. But if you find that he is guilty of some and not guilty of others, you may so return your verdict. A general verdict of not guilty will mean not guilty of the whole thing.

Mr. Sommer, is there anything you feel I have not covered in your requests? If so, come up here.

Now ladies and gentlemen, I think that I have fulfilled my function of explaining to you the law which you will take and apply to the facts as you determine them.

This case is an important case. Any case upon which a jury is called to pass upon the question of the guilt or innocence of a

fellow-man is important. Some are more important than others; some acquire importance because of the conditions that exist in the world at the time when a case is being tried. This case arises out of a war situation. That must not affect you, insofar as being rushed along by war hysteria is concerned. It should put you the more on your guard not to be carried away by your feelings or by your patriotism; because patriotism requires a dedication to justice and no amount of flag waving can substitute for that which must be in the heart before real patriotism can be evident. A patriotic person is a just person; a person who in time of stress can still retain his balance and his fairness, and his recognition of the basic principles that mean America.

It is important, I say, because of the times; it is important
106 that because of the times you do justice in order that the American idea may not be just swept aside. You must stand fast, stand fast to principle. We are fighting a war for a principle; therefore we must not yield our principles while we fight for those principles.

I cannot tell you in any better language than the language which was used when you took your oath what your duty is in the present situation, and that was, if you recall it, a true verdict to render according to the evidence, so help you God. That, ladies and gentlemen of the jury is your present duty.

(The jury retired.)

The COURT. I have refused to charge the requests which have been presented by counsel in other language than that which I have used and I feel I have covered all the requests sufficiently.

Mr. SOMMER. I take exception to your Honor's refusal to charge. Request number 21.

(Which exception is hereby allowed and sealed accordingly).

[SEALED] THOMAS F. MEANEY.

(At 5 p. m. the jurors resumed their seats in the jury box.)

The COURT. I have your request, ladies and gentlemen, to clarify that part of my charge which covered intent. I shall try to make evident what I intended to convey. In order that there may be a crime here, there must have been an intent on the part of this defendant to commit that crime, which was to receive a price for the paper which he sold which was in excess of the ceiling
107 price. Now, if actually there had been paid to him more than the ceiling price, but it was the intent and intention of all persons respecting it, not to accept that as the final price necessarily, but to accept it subject to adjustment which would be made upon the examination of the paper actually delivered and the establishment of the price set by law for that paper, that is, if they had the idea that the only price to be received was that

which the law set for the paper actually delivered, and that actually was what was paid, then there was no intent on his part to break the law. But if he sold this paper to the dealer, the wholesale dealer for a price which was above the ceiling price, and that was the price that he intended to get, and if you find as a fact that the only reason he didn't get it was because he didn't get away with it and there was a discovery without his having intent to do the honest decent thing, and that was the only reason he didn't get it, still he would have had an intent to commit the crime and would have effectively committed it when he received above-ceiling price which he intended to receive, if he did so intend, and if the only reason that he didn't get the ceiling price was because he was found out.

In other words, there must be, before you can find him guilty, there must have been in his mind an intention not to set a price and then have it adjusted afterwards according to the truth of the situation, but an intent to fix this price and charge it and get away with it,—an intent to commit the crime, the formation of a purpose in his mind when he did this thing, to get more money for that paper than the ceiling price established by law.

I hope you understand what I mean, because there has been in the defense set up the thought that he did charge the price which was set for something which actually was not delivered, but that the terms of the contract were that if there was any variation, there would then be a revision; and he says that he shipped with that intention, and that he didn't actually himself know what was shipped, but gave orders to his people to deliver what was ordered. Now, you just delve into that from the evidence and consider only the evidence brought out at this trial, and arrive at your determination. Have I answered your question now?

108

The FOREMAN. Yes.

The COURT. Very well.

(The jury retired.)

* * * * *

Defendant's request to charge

21. That the evidence offered to prove the various counts in the information is not sufficient to exclude every other hypothesis save that of guilt and it is therefore my duty to instruct you to acquit the defendant.

* * * * *

109

Exhibit G–10

DEBIT MEMO

Waste Paper Packers Since 1897

JAMES CARRANO'S SONS, INC.

563–5 WATER STREET, NEW YORK, N. Y.

GRamercy 5–3341

To: T. BRUNO PAPER STOCK,
106 McKinley Street, Hackensack, New Jersey.

Debit No. 9715. Grade —. Your Inv. dated 3/31. Car No. CBQ–22160. Date Apr. 13, 1944.

We debit your account as follows:
In Re: Your invoice dated March 31st: #1 Assorted Kraft—35310#.

Amount invoice paid		$635.59
Mill received:		
#1 Mixed Papers, 2005# @ $0.75 cwt. (W. T.)	$15.04	
Old Corrugated Cont., 25990# @ $1.20 cwt. (W. T.)	311.88	
#1 Assorted Kraft, 6735# @ $1.80 cwt. (W. T.)	121.23	448.15
Difference		187.44

110

DEBIT MEMO

Waste Paper Packers Since 1897

JAMES CARRANO'S SONS, INC.

563–5 WATER STREET, NEW YORK, N. Y.

GRamercy 5–3341

To: T. BRUNO PAPER STOCK,
106 McKinley Street, Hackensack, New Jersey.

Debit No. 9716. Grade —. Your Inv. dated 3/30. Car No. PRR–92203. Date Apr. 13, 1944.

We debit your account as follows:

In Re: Your invoice dated March 30th: #1 Assorted Kraft—25620#.

Amount invoice paid		$461.16
Mill received:		
Old Corrugated Containers 24040# @ $1.20 cwt. (W. T.)	$288.48	
Kraft Bag Waste 485# $2.80 cwt. (W. T.)	13.58	302.06
Difference		159.10

111

DEBIT MEMO

WASTE PAPER PACKERS SINCE 1897

JAMES CARRANO'S SONS, INC.

563–5 WATER STREET, NEW YORK, N. Y., GRamercy 5–3341

To: T. BRUNO PAPER STOCK,

106 McKinley Street, Hackensack, New Jersey.

Debit No. 9644–9645. Grade—Your Inv.—Car No.—Date Aug. 10, 1944.

(Duplicate)

We debit your account as follows:
In Re: Your invoice Dated March 22, 1944—PA–68312.
" " " " " " KCS–25293.
#1 Assorted Kraft taken in as Old Corr. Containers.
Car: PA–68312.

Difference in Price, 25110# @ 60¢ cwt	$150.66
Car: KCS–25293.	
Difference in Price, 45115# @ 60¢ cwt	270.68
	$421.35

Assorted Kraft	$1.75
Corrugated	1.75
Difference	.60

112 *Defendant's exhibit*

PURCHASE ORDER

PAPER MILL SUPPLIES

JAMES CARRANO'S SONS, INC.

563–5 WATER STREET

GRAMERCY 5–3340

Our Order No. 3958

(This number must appear on your invoice)

NEW YORK CITY, *March 22, 1944.*

T. BRUNO

106 McKinley Street—Hackensack, New Jersey.

We confirm having purchased from you the following, subject to specifications and conditions printed and written hereon.

Quantity: 5 Cars, #1 Assorted Kraft—#1 Mixed Papers—#1 News—Overissue News—.

Quality: T. S. #1 Soft Brown Kraft—Kraft Bag Waste—#1 Col. Ledgers—#1 Wht. Ledgers—#1 Old Corr. Containers.

Price: Ceiling prices plus F. O. B. cars terms: Usual $1.00 ton loading.

Specifications: B 9694, B 9715.

Date of delivery: Immediately to: B 9716, G 9736.

Ship via:

Remarks: Cars must be loaded in accordance with O. D. T. #18A–1. Please use enclosed bills of lading (Ohio).

Shipment against this order acknowledges acceptance.

113 Our order number and railroad car number must appear on your invoice, before passed for payment.

The above merchandise is purchased subject to mill or consignee's report as to weight, quality, excess freights, etc.

We reserve the right to cancel this order, without notice, if not shipped within the specified time.

This order is contingent upon fires, strikes, embargoes and all other causes beyond control.

JAMES CARRANO'S SONS, INC.

By ——— ———

114 In United States District Court

Assignment of error

Now comes the defendant-appellant, Louis Bruno, and says that in the record, proceedings and judgment aforesaid there is manifest error and for assignment thereof says that:

1. The trial court erred in denying defendant's motion to dismiss the information or in the alternative to direct a verdict of "not guilty" on each of the counts of the information at the end of the Government's case.

2. The trial court erred in denying defendant's motion for a directed verdict of "not guilty" at the end of the entire case.

3. That the trial court erred in refusing to charge the jury as requested by the defendant in his twenty-first request to charge, namely:

"21. That the evidence offered to prove the various counts in the information is not sufficient to exclude every other hypothesis save that of guilt and it is therefore my duty to instruct you to acquit the defendant."

4. The verdict was against the weight of the evidence.

GEORGE R. SOMMER,
Attorney for Defendant-Appellant.

115 In United States Circuit Court of Appeals for the Third Circuit

No. 9055—October Term, 1945

UNITED STATES OF AMERICA

v.

LOUIS BRUNO, APPELLANT

Appeal from a Judgment of the District Court of the United States for the District of New Jersey

Argued January 25, 1946

Before BIGGS, GOODRICH and O'CONNELL, Circuit Judges

Opinion of the court

Filed February 15, 1946

By GOODRICH, *Circuit Judge*

The defendant was prosecuted by information for having unlawfully sold waste paper at a price higher than the ceiling set.[1]

[1] Maximum Price Regulation 30, as amended, issued pursuant to Emergency Price Control Act of 1942.
The price allegedly charged was $1.75 per hundredweight (maximum price for assorted Kraft) while the price that allegedly should have been charged was $1.15 per hundredweight (maximum price for Corrugated).

The information was in five counts, each count charging the sale of a separate carload of the paper. The defendant was found guilty on each count. The one question before us on this appeal is the sufficiency of the evidence to sustain the conviction.
116 Defendant's rights on this question were preserved by appropriate motion at the close of the government's case and again at the close of all the testimony.

The defendant, Louis Bruno, is in charge of a small corporation which buys and sells waste paper. At the time of the events in question it was owned by Bruno's sister-in-law. The undisputed testimony shows that the sales were made as follows: Bruno received, from time to time, orders from a broker in this type of merchandise named Carrano. Carrano had offices in New York. He ordered from Bruno the various cars of waste paper of a type called "Kraft" which, we understand, is ordinary brown wrapping paper. The cars were loaded with paper, the cars were sealed and invoices for the shipment as Kraft waste paper sent to Carrano. The paper did not go to Carrano, however. It was sent in the sealed-up cars, at his direction, to the consignees. There were two concerned in the events here, one in Ohio and the other in New York. One received three of the cars; the other one two. Carano never saw the paper. The invoices were for the ceiling price. It appears, without dispute, that the cars did not contain Kraft paper. They contained some Kraft and some corrugated and, in some instances, miscellaneous waste paper. All this is clearly established and no one denies it. If this was all we had to the case a clear violation would, obviously be proved. We have an order for Kraft paper, a shipment of inferior quality invoiced at the Kraft-paper price and then payment by Carrano at invoice price.

That, however, is not all there is to the story from the government's witnesses. It is also proved that the orders from Carrano to Bruno and the orders from the consignees to Carrano were subject to check by the consignees at destination. According to the witnesses, still for the government, this was in accordance with business custom. It appeared that when an order was given by a broker to a shipper, such as Bruno, the shipper in filling the
117 order would invoice it to the broker in accordance with the terms of the order. Then the broker paid the shipper, as Carrano did here. If the shipper were a stranger to him he might hold back part of the price until the factory reported on quality. But if the shipper had an established relationship the broker would advance the money to the shipper according to invoice and then charge it back to him, or deduct it on the next payment if the factory reported a deficiency in quality. The shipper was not compelled to accept the factory's report on quality. He had

a chance, if he wished, to call back the shipment or direct its consignment elsewhere. It was also in the testimony that in times like the present, with paper very scarce, the shipper would customarily fill up the car with whatever he had on the assumption, as proved by experience, that the factories were very glad to have any kind of paper they could get.

Both the representatives of the consignees who have testified and Carrano, the broker, were clear and explicit in their statements that the ultimate price paid was not more than ceiling. All of this testimony, it should be repeated, developed in the government's case in chief.

What basis have we for saying the jury was at liberty to disbelieve all this explanatory testimony and find the defendant guilty as charged? We are not proceeding on the theory that the government having presented certain persons as witnesses is irrevocably bound by what they say.[2] Without that, however, it is the government's burden to establish the guilt of the defendant and it must win on the strength of its own case, not the weakness of that of the accused. The method of transacting business in this fashion does not startle us. While we do not wish to press the limits of judicial notice to extremes, we do
118 know it to be the fact that some businesses are conducted in this way and that the business of selling waste paper is also included does not seem inherently improbable.

The government points to two pieces of testimony which it thinks demolish the explanation of innocence. When an OPA investigator went to see Bruno and look at his books he found that the entries in which these shipments were charged to Carrano were for a sum less than the invoices sent Carrano indicated. The explanation that Bruno gave to the investigator was that this was the way Bruno had augmented his salary. This "commission" had been arranged with his brother he said. The books, themselves, according to the testimony, showed neither payments of the invoices by Carrano nor evidence of charges back, by Carrano, because of discrepancies between invoice and shipments.

This bit of testimony, it may be granted was suspicion creative. But concerning what does it create suspicion? It may well tend to discredit Bruno as a witness by reason of its improbability. It may also tend to show that he was wrongfully taking money from the concern by whom he was employed. But he was not being prosecuted for that. We do not see that it bears one way or the

[2] This doctrine is severely criticized in 3 Wigmore on Evidence (3rd ed.) 385 § 897. "The primitive notion, that a party is *morally bound by the statements of his witnesses*, no longer finds defenders, although its disappearance is by no means far in the past. In the early 1800's the judges were still engaged in repudiating this false notion of the basis of the rule against impeaching one's own witness: [citing early precedents]."

other on the question whether he sold waste paper above ceiling prices.

The other circumstance is that debit memoranda issued by Carrano against the shipments, or some of the shipments, involved in the transactions which were the subject of prosecution, came after it was known that an OPA investigation was in progress. This fact has some significance it may be granted. The significance, however, is greatly decreased when it is observed that the time between the OPA inspection and the memoranda is comparatively close.[3] There was testimony, also, that in this particular period reports from the factory to the broker were not as prompt as
119 they were in less confused times. As against this circumstantial evidence, Carrano had testified that he always made the charges back when the goods did not correspond with invoice.[4]

There is inferential innuendo, although not outright statement, that perhaps the broker and the buyers as well as the shipper were lacking in frankness and that possibly all may have been involved in purchases and sales above ceiling prices.[5] We quite realize the difficulty under which the government agency works in trying to get its facts, the revelation of which may be unpleasant to the several parties of a transaction. Nevertheless, if a man is to be convicted of a crime it must be proved, not left to conjecture or suspicion. Disregarding altogether defendant's testimony here we still cannot find in the testimony of the government's witnesses or the permissible inferences to be drawn therefrom enough to sustain the conviction of this defendant.

Reversed.

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[3] Thus Francis C. Duffy of the OPA testified that on April 6, 1944 he graded and inspected cars, P.R.R. 92203 and C.B.Q. 22160. The debit memos from Carrano to the Bruno concern, in the exhibits, show a date of April 13, 1944 for both.

[4] We have only a small sampling of all the debit memos passing between the parties in the general course of their business. It is therefore interesting to note, and of more than incidental significance, that Bruno's testimony that on occasions the material billed as No. 1 Assorted Kraft was better stock is borne out by at least one of the exhibits in the record. The memo of April 13, 1944 on car No. P.R.R. 92203, referred to in note 3, showed that the shipment, in addition to corrugated which is inferior to No. 1 Assorted Kraft, contained Kraft Bag Waste which is superior stock with a price considerably higher than No. 1 Assorted Kraft. The Kraft Bag Waste is billed at $2.80 cwt. of which $0.05 apparently represents a charge for handling, etc. The ceiling on the No. 1 Assorted Kraft as pointed out in footnote 1 is $1.75 cwt. plus a similar small charge for handling, etc.

[5] In addition to lack of affirmative evidence on this point, we must bear in mind the facts of footnote 4 as well as the undisputed nature of the testimony by the government's own witnesses contra. The rather primitive bookkeeping and unbusinesslike merchandising methods of the Bruno concern are chiefly responsible for these vague intimations by innuendo.

120 In the United States Circuit Court of Appeals for the Third Circuit

No. 9055—October Term, 1945

UNITED STATES OF AMERICA

vs.

LOUIS BRUNO, APPELLANT

Present: BIGGS, GOODRICH, and O'CONNELL, Circuit Judges

On Appeal From the District Court of the United States for the District of New Jersey

Judgment

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

By the Court.

GOODRICH,
Circuit Judge.

FEBRUARY 15, 1946.

(Endorsements:) Order Reversing Judgment. Received and filed, Feb. 15, 1946. William P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief, as constituting the portions of the record before this court at argument; and proceedings in this court, in the case of United States of America vs. Louis Bruno, Appellant, No. 9055, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 22d day of March in the year of our Lord one thousand nine hundred

and forty-six, and of the Independence of the United States the one hundred and seventieth.

[SEAL] (S) WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

121 Supreme Court of the United States

Order allowing certiorari

Filed May 13, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

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FILED
MAR 23 1946
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 67

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS BRUNO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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688242—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 988

UNITED STATES OF AMERICA, PETITIONER,

v.

LOUIS BRUNO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUT COURT OF APPEALS FOR THE THIRD CIRCUIT

The United States of America, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled case entered on February 15, 1946, reversing a conviction of respondent for violation of the Emergency Price Control Act.

OPINIONS BELOW

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1946. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

QUESTIONS PRESENTED

1. Whether a jury can find a seller of a commodity under price control guilty of a criminal violation where he wilfully sells at an over-ceiling price by falsely describing the commodity's grade, if the purchaser has a right to inspect shipments and reject any that are upgraded.

2. Whether, if so, a custom of sellers to invoice goods at grades higher than those of the goods actually shipped constitutes a defense when the custom itself is in violation of the Price Control Act.[1]

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. § 901, et seq.), as amended, and Maximum Price Regulation No. 30 (7 F. R. 9732) issued under Section 2 (a) of that Act. The pertinent provisions are set forth in the Appendix, *infra*, pp. 14–16.

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[1] In case certiorari is granted, we shall also argue that the court below erred in finding evidence of an industry custom to ship ungraded goods, in finding that respondent had repaid the amounts overcharged on all the shipments covered by the indictment, and in finding that there was insufficient evidence to support the jury's verdict.

STATEMENT

This is a criminal prosecution of Louis Bruno for selling waste paper at prices higher than those established by Maximum Price Regulation 30. Five separate sales were made the basis for as many counts in the information. The jury found the defendant guilty on all counts (R. 1a). Defendant was sentenced to six months' imprisonment and a fine of $500 (R. 1a).

Defendant dealt with a broker named Carrano. Carrano, though called a broker, was really an independent dealer who actually bought the paper from the defendant and paid for it. He sold it to his customers and had it shipped directly to them by the defendant. In each transaction Carrano ordered #1 Assorted Kraft Paper from the defendant. The defendant invoiced the shipments accordingly and charged $1.75 per hundred weight, the ceiling price therefor. Two carloads were sent to the Ohio Boxboard Company and three to the Taggart Corporation, as directed by Carrano. He paid the defendant the invoice price. (R. 9a–13a). However, actual inspection by the mills revealed that each shipment was composed almost entirely of corrugated paper (R. 28a–29a, 42a–43a), the ceiling price of which is $1.15 per hundred weight. The Secretary of the Ohio Boxboard Company testified that the inspection report on the first car showed that 27,984 pounds out of 34,719 pounds shipped were inferior paper (R. 28a).

On the second car 24,040 out of 24,525 pounds were upgraded, and only 485 pounds were Assorted Kraft, the correct grade. None was a superior grade (R. 29a, 30a).[3] The third shipment was composed entirely of inferior paper, as were the fourth and fifth (R. 35a–36a, 41a, 42a–43a).

In two cases the mills made no complaint about the upgrading (R. 43a) and defendant retained the overcharges (R. 12a, 43a). In three cases, after the Office of Price Administration had begun investigation, the mills paid Carrano only for the quality received; as a result debits were charged by Carrano to Bruno. In the first sale the debit was $187.44, leaving a correct price, according to the debit memo, of $448.15 (R. 109a); in the second the debit was $159.10, the correct price $302.06 (R. 110a); and in the third the debit was $270.69, the correct price $541.38 (R. 13a, 111a). Roughly, then, there was an overcharge of from 40% to 50% on these three shipments where debits were made. On the two shipments where defendant kept the full invoice price, the overcharge was approximately 50%.

[3] The court below, in footnote 4 of its opinion, erroneously stated that an undercharge was made for this small item. This was based on the debit memo from Carrano to Bruno (R. 110a) and Bruno's statement (R. 68a). But the mill which actually inspected the paper found that it was only Assorted Kraft paper as invoiced, and paid for it at $1.75 per hundred weight (R. 29a, 30a).

Bruno admitted that he frequently shipped inferior paper, and billed it as Assorted Kraft Paper (R. 67a–71a).[2] There was testimony that the mills customarily inspected their receipts of wastepaper, and if they were below grade, would notify Carrano (R. 17a, 18a). He would communicate with the defendant, and if the latter agreed, Carrano would allow the mill to keep the merchandise and pay the correct price. *Ibid.* Carrano in turn would debit the defendant for the difference between the correct price and that already paid (R. 68a, 70a).

Carrano testified that he had no arrangement with Bruno whereby Bruno could bill merchandise as Assorted Kraft but ship inferior paper (R. 88a). The accountant for the Taggart Corporation testified that he had received no previous reports that corrugated paper was shipped instead of Assorted Kraft (R. 42a), despite defendant's admission that he often did this (R. 67a–71a). The government proved that the three repayments of the overcharge to Carrano promptly followed an OPA investigation, and offered to prove that these were the only ones ever made during the long course of dealings between Carrano and Bruno (R. 24a, 42a). Defendant admitted that he knew Carrano wanted

[2] Defendant admitted that he did not do this because the paper was mixed in his warehouse, inasmuch as the different types were baled separately, but merely because he just threw in inferior paper when he didn't have enough Assorted Kraft for an order (R. 68a–70a).

Assorted Kraft when he made such orders (R. 77a), and that on at least two occasions when he shipped different grades of paper he listed them separately (R. 82a).

Bruno billed Carrano for Assorted Kraft Paper, but in his ledger, he entered much lower figures. The first sale was invoiced at $635.59 but entered as $476.69, and similar entries were made for the other sales (R. 53a). The lower figures were far closer than the invoice prices to the correct ceiling prices.[4] No record of any debit whatsoever for upgraded material was made in the books kept by the firm (R. 54a).

The Circuit Court of Appeals overturned the jury's verdict and held that no criminal violation had been established, on the theory that an upgraded sale does not violate a price regulation when there is an industry practice whereby the buyer reserves the right to regrade the shipment on arrival, and where it may be customary for the seller to ship and bill without regard for the lower quality of the merchandise.

---

[4] Defendant explained these large discrepancies by declaring that he had an arrangement with his brother (whose wife owned the firm) which allowed him these differences as his commission (R. 72a, 73a). On these five sales, if these concealed amounts were commissions, they would amount to roughly $10 per ton. Defendant stated that the firm sold from 300 to 500 tons of paper weekly (R. 60a). This would mean that while his salary was $20 per week (R. 60a), his commissions would range from $3,000 to $5,000 weekly, or about one fourth of the gross sales made!

REASONS FOR GRANTING THE WRIT

1. The decision of the court below, if allowed to stand, makes it virtually impossible for the government to protect price ceilings from a favorite device of the black market—upgrading. Upgrading consists of invoicing merchandise at grades superior to those shipped, thereby concealing an overceiling charge for the inferior merchandise actually delivered.

This is a typical case of flagrant upgrading. The jury found that the seller had shipped waste paper under a false description in order to obtain, and had been paid, more than the ceiling price. The court below held that the seller had a defense because of the following practices: the mills (which bought from the broker) inspected the shipments, and when they detected and complained about an upgraded shipment, the broker notified the defendant; if he consented, the mill kept the shipment and the broker debited the defendant for the difference between the price already paid on the inflated invoice and the ceiling price;[5] it was customary for the shipper to fill up a car with anything he had.

The importance of the court's ruling springs from the pervasiveness of the defense it recognizes and its effect on the administration and enforcement of the Emergency Price Control Act.

[5] The debiting did not, contrary to the assumption of the court below, always take place. See p. 4, *supra*.

a. The primary emphasis of the opinion below is on the mills' inspection of the merchandise. This asserted defense is always present when a seller attempts to evade price regulations by upgrading. The "business custom" attributed by the court to purchasers of waste paper is nothing more than the universal practice of buyers to inspect what they order and to refuse to pay for something they do not receive. The housewife opening a department store delivery of her order follows this custom along with thousands of industrial and commercial concerns. What the mills did in this case was simply to exercise their elementary rights under the law of sales. Accordingly, the court's ruling implies that willful upgrading in any of the millions of sales subject to price control is not a violation of the Price Control Act.

Since the beginning of price control, the Office of Price Administration has found upgrading practiced in the sales of numerous scarce commodities. In order to detect and halt this method of evading price ceilings, it has found it necessary to conduct continuing programs of inspecting merchandise after shipment, usually at destination, and comparing the inspection reports with the invoices. It has made thousands of such inspections and has found thousands of upgrading violations, particularly in meat, butter, eggs, corn, coffee, lumber, waste paper, hides, and iron and steel scrap. Numerous civil and criminal cases

have been instituted and brought to successful conclusion on the basis of these inspections and many are still pending. In many of these cases the defendant has urged that the recipient of the merchandise had the practice of inspecting the goods received and either rejecting misdescribed goods or paying only on the basis of the true description. Unless reversed, this decision will greatly impede these enforcement programs.

The decision, in this aspect, conflicts with *United States ex rel. Bowles* v. *Leonard Seidmon*, decided by the Circuit Court of Appeals for the Seventh Circuit on March 19, 1946 (not yet reported). This was a proceeding against a seller of iron and steel scrap for criminal contempt of an injunction. The evidence showed that upon inspection at the time of unloading the buyer was entitled, under the contract of sale, to reject any undergrade material found or to retain and pay for it at the price provided for the grade. The court affirmed the judgment of criminal contempt for violating a provision of an injunction which enjoined the defendant from "directly or indirectly selling, delivering, or offering for sale or delivery, iron and steel scrap at prices in excess of the maximum prices therefor * * *" Even if the *Seidman* case, in which no overceiling payment was received by the seller, holds no more than that, under such circumstances, there was a wilful offer to sell in violation of the regula-

tion, it conflicts with the theory of the court below which necessarily involves the conclusion that where a seller knows that his purchaser may inspect and downgrade in accordance with contract or custom no wilful violation is possible.

b. The opinion of the court below states:

> It was also in the testimony that in times like the present, with paper very scarce, the shipper would customarily fill up the car with whatever he had on the assumption, as proved by experience, that the factories were very glad to have any kind of paper they could get.

There is nothing in the record which supports this statement, with the problematical exception of the defendant's testimony that he upgraded his cars. There is, of course, nothing wrong in filling a car with whatever one has, so long as the purchaser is not charged for higher grade merchandise than is sent. In the absence of any showing that it was industry practice to ship various grades of paper and invoice for the highest grade, defendant's testimony that he frequently did this proves only that he violated the law.

And even the existence of such an industry custom of loading low grade paper and invoicing for a higher grade would have been irrelevant, inasmuch as such a practice would have been in violation of the provisions in the Act and regu-

lations requiring correct invoicing,* and sales and deliveries at not higher than ceiling prices. Certainly defendant could gain no comfort from a custom which in itself was unlawful. If that were not so an industry in which black-marketing were sufficiently prevalent would by reason of that fact alone be immune from prosecution. It is important that no such means of evasion of the Price Control Act as appears to be available under the decision below be left open to black-marketers.

Testimony that the mills had a practice of inspecting and rejecting upgraded merchandise is not, of course, equivalent to testimony that shippers customarily shipped upgraded cars. The only pertinent evidence in the record, Carrano's testimony, contradicts the existence of the latter practice (R. 88a). Furthermore, the broker customarily specified particular grades in his order (R. 15a), a meaningless gesture if he expected random loading; and Bruno knew that Carrano wanted what he specified (R. 77a).

2. It is, of course, the function of the jury and not of the appellate court to find the facts. In this case there was clearly no basis for the reversal by the court below of the jury's finding

* The provision of the regulation, *infra*, pp. 15–16 requires that sales of waste paper be invoiced and the invoices kept on file. Section 204 (b) and 205 (b) make it unlawful for anyone to make a false statement in any document required to be kept or filed.

that the defendant sold wastepaper with the intent to obtain overceiling prices.

The regulation prohibits the sale and delivery of wastepaper at prices in excess of ceiling prices. The evidence is uncontroverted that the defendant sold and delivered corrugated paper for the higher ceiling prices applicable to sales of Kraft, and received payment at such prices, knowing that he had not shipped Kraft. On these facts, the violation was complete under the terms of the regulation. The subsequent inspection and charge back, all by third persons, could not relieve the seller of the violation he himself had committed. Indeed, since the seller had delivered, billed, and received payment, there was no additional action within his control which he could have committed to violate the regulation further on that sale.

3. The court below also stated that the evidence was "clear and explicit * * * that the ultimate price paid was not more than ceiling." This was not true as to the sales described in two of the five counts of the indictment, as to which no debits or repayments were made. See pp. 4–5, *supra*. There can be no question, therefore, that these sales were unlawful even under the court's own theory. The penalty imposed on defendant was not in excess of that allowable for either of these two counts (R. 1a).

CONCLUSION

The court below decided questions of importance to the enforcement and administration of the Emergency Price Control Act. Its decision conflicts with a decision of another Circuit Court of Appeals. It is clearly wrong. For these reasons a writ of certiorari should be granted.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
Office of Price Administration,
Washington, D. C.

MARCH 1946.

APPENDIX

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV, 901, *et seq.*, are Sections 4 (a) and 205 (b).

Section 4 (a) provides:

> It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 205 (b) provides:

> (b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprison-

ment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

The pertinent provisions of Maximum Price Regulation No. 30, which establishes maximum prices for wastepaper, are as follows:

§ 1347.1 PROHIBITIONS. Regardless of any contract, agreement, lease or other obligation:

(a) No person shall sell or deliver any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(b) No person shall buy or receive any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(c) No person shall agree, offer, solicit, or attempt to do any of the foregoing.

Section 1347.14 (f) as it existed at the time of the transactions involved:

(f) *Invoice requirements.* All sales of wastepaper commercially packed shall be invoiced. When delivery of the wastepaper is out of seller's warehouse, the invoice shall accompany the delivery or be mailed to purchaser before the end of the business day following the day upon which the wastepaper is shipped. In all other cases, the invoice shall be mailed before the end of the business day following the day upon which the wastepaper is shipped

except that in those cases where seller does not receive the description of the wastepaper from his own supplier within that time, he shall send the invoice to purchaser as soon as he does receive that description. A copy of such invoice shall be kept on file by the seller, and the original shall be kept on file by the purchaser. The invoice shall state as separate items the following data:

(1) *The grade name.* This shall be (i) the applicable grade name set forth in paragraph (a) of this § 1347.14, or (ii) the grade name of a specialty with respect to which sworn statements and samples have been submitted to the Office of Price Administration in accordance with paragraph (c) of this § 1347.14.

(2) *The origin of the shipment.* This shall include the name of the city or town where the point of shipment is located. If delivery is in the seller's own truck, and if the point of shipment and the buyer's premises are located at a distance of more than ten but less than fifteen miles from each other by the shortest available highway route, the street address and city where such point of shipment is located shall be shown.

(3) *The destination of the shipment.* This shall include the name, street address and city of the consumer.

(4) Any amount charged by the seller for transportation of the wastepaper.

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No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS BRUNO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals (R. 71–74) has been reported in 153 F. 2d 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1946 (R. 75). The petition for a writ of certiorari was filed on March 23, 1946, and was granted on May 13, 1946 (R. 76). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

QUESTIONS PRESENTED

1. Whether a jury can find a seller of a commodity under price control guilty of a criminal violation where he wilfully sells at an over-ceiling price by falsely describing the commodity's grade, if the purchaser has a right to inspect shipments and reject any that are upgraded or by consent of the seller pay for them on the basis of their true grade.

2. Whether there was a custom in the trade for sellers to invoice goods at grades higher than those actually shipped.

3. Whether, if so, such a custom constitutes a defense when the custom itself is in violation of the Emergency Price Control Act.

4. Whether respondent repaid the amounts overcharged on all of the shipments covered by the information.

5. Whether, if so, such payment constitutes a defense.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are the Emergency Price Control Act of 1942 and Maximum Price Regulation 30. The pertinent provisions thereof are set forth in the Appendix, *infra*, pp. 23–26.

STATEMENT

A criminal information was brought against respondent Louis Bruno, for having wilfully sold

waste paper at prices higher than the ceilings established by Maximum Price Regulation 30. Five separate sales of a carload each were the basis for as many counts in the information (R. 2–4). The jury found respondent guilty on all five counts. He was sentenced to six months' imprisonment and a fine of $500 (R. 1). The judgment of conviction was reversed by the Circuit Court of Appeals (R. 75), to which court this Court has issued a writ of certiorari (R. 76).

Respondent sold waste paper to one Carrano, who resold it, respondent shipping the paper directly to Carrano's customers (R. 5–6). Although called a broker, Carrano was actually an independent dealer, who bought the paper from respondent and paid for it (R. 5). In each transaction upon which this information was based, Carrano ordered #1 Assorted Kraft Paper from respondent. Respondent invoiced the shipments as such, and charged $1.75 per hundredweight, the ceiling price therefor (R. 5–9, 41–42, 49–50). Pursuant to Carrano's directions, two carloads were sent to the Ohio Boxboard Company and three to the Taggart Corporation (R. 6–8). Carrano paid respondent the invoice price (R. 6–9, 44–45, 54–55). However, inspection at the mills revealed that each shipment was composed almost entirely of corrugated paper, the ceiling price of which is $1.15 per hundredweight

(R. 18, 26–27). The first car contained 27,984 pounds of inferior paper out of 34,719 pounds shipped (R. 17–18, 31). On the second car, 24,040 pounds were upgraded, and only 485 pounds were Assorted Kraft[1] the correct grade (R. 18, 30, 32, 42). None was a superior grade (R. 18, 19). The third car was composed entirely of inferior paper, as were the fourth and fifth (R. 22, 26, 27, 29).

In two cases, the mills made no complaint about the upgrading and respondent retained the overcharges (R. 27, 28). In three cases, after the Office of Price Administration had begun an investigation, the mills paid Carrano only for the quality received; as a result debits were charged by Carrano to Bruno (R. 11–13). In one sale[2] the debit was $187.44, leaving a correct price, according to the debit memo, of $448.15 (R. 68); in another[3] the debit was $159.10, the correct price $302.06 (R. 68–69); and in a third[4] the debit was

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[1] The Court below, in footnote 4 of its opinion (R. 74), erroneously stated that an undercharge was made for this small item. This was based on the debit memo from Carrano to Bruno (R. 68–69) and Bruno's statement (R. 42). But the mill which actually inspected the paper found that it was only Assorted Kraft Paper as invoiced, and paid for it at $1.75 per hundredweight (R. 18, 19).

[2] Count 1 of the information.

[3] Count 2 of the information.

[4] Count 5 of the information.

$270.69, the correct price $541.38 (R. 8, 69). Roughly, then, there was an overcharge of from 40% to 50% on these three shipments where debits were made. On the two shipments[5] as to which the respondent kept the full invoice price, the overcharge was approximately 50%.

Respondent admitted that he frequently shipped inferior paper, and billed it as Assorted Kraft Paper (R. 41–44).[6] There was testimony that the mills customarily inspected their receipts of wastepaper, and that if the paper was below the grade at which it had been invoiced, the mills would notify Carrano, who, in turn, would communicate with respondent (R. 10–11). If the latter agreed, Carrano would allow the mill to keep the merchandise and pay him the correct price (R. 11). Carrano, in turn, would debit respondent for the difference between the correct price and that already paid by him (R. 42–44).

Carrano testified that he had no arrangement with respondent whereby the latter could bill merchandise as Assorted Kraft but ship inferior grades (R. 55; cf. R. 10–12). The accountant for

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[5] Counts 3 and 4 of the information.

[6] Respondent admitted that he did not do this because the paper was mixed in his warehouse (the different types were baled separately), but merely because he threw in inferior paper when he didn't have enough Assorted Kraft for an order (R. 42–43).

the Taggart Corporation who, upon notification from his company's plant of shipments received, paid its bills, testified that he had received no previous reports that corrugated paper was shipped instead of Assorted Kraft (R. 26), despite respondent's statement that he often did this (R. 42–44). Respondent testified that the arrangement made was that he receive only the ceiling price (R. 41, 43–44). However, no repayment of the excess was made in two of the five sales involved (R. 27, 28). The government proved that the repayments of the overcharge to Carrano in the other three cases promptly followed an OPA investigation,[7] and offered to prove that these were the only ones ever made during the long course of dealings between Carrano and Bruno (R. 15–16, 26). Respondent admitted that he knew Carrano wanted Assorted Kraft when he made such orders (R. 48), and that on at least two occasions when he shipped different grades of paper he listed them separately (R. 51).

Bruno billed Carrano at prices appropriate for Assorted Kraft Paper, but he entered much lower figures in his ledger. The first sale was invoiced at $635.59 but entered as $476.69, and similar entries were made for the other sales (R. 33). The lower figures were far closer than the invoice

[7] The investigation started on April 5, 1944 (R. 32, 29). The three debit memos from Carrano to Bruno were made on April 10, April 13, and August 10, 1944, respectively.

prices to the correct ceiling prices.[5] No record of any debit whatsoever for upgraded material was made in the books kept by the firm (R. 34, 58).

The jury convicted on all five counts (R. 1). The Circuit Court of Appeals overturned the jury's verdict and held that no criminal violation had been established, on the theory that there was an industry practice whereby the buyer reserved the right to regrade the shipment on delivery, that such regrading was done in connection with the sales involved in this case, that refunds were made, and that it was customary for the seller to ship and bill without regard for the lower quality of the merchandise (R. 71–74).

SPECIFICATION OF ERRORS TO BE URGED

In a prosecution for wilfully selling wastepaper at overceiling prices in violation of Maximum Price Regulation 30 by means of a false description of the grade of paper—

1. The court below erred in holding that the purchaser's right to check the shipments for quality (and either reject any that were upgraded or,

[5] Respondent explained these large discrepancies by declaring that he had an arrangement with his brother (whose wife owned the firm) which allowed him these differences as his commission (R. 45). If these concealed amounts were commissions, they amounted to roughly $10.00 per ton on these five sales. Respondent stated that the firm sold from 300 to 500 tons of paper weekly (R. 38). This would mean that while his salary was $20 per week (R. 38), his commissions would range from $3,000 to $5,000 weekly or about one-fourth of the gross sales made!

by consent of the seller, pay for them on the basis of their true grade) was a complete defense to the prosecution.

2 (a). The court below erred in determining that there was a custom in the trade for sellers to invoice goods at grades higher than those actually shipped.

(b). The court below erred, if such a trade custom were established, in holding that it constituted a defense to this prosecution and in failing to hold that the custom was itself a violation of the Act and the Regulation.

3 (a). The court below erred in determining that respondent had repaid the amounts overcharged on all of the shipments covered by the information.

(b). The court below erred in concluding that such repayment constituted a defense.

4. The court below erred in finding that there was insufficient evidence to support the jury's verdict.

SUMMARY OF ARGUMENT

Respondent was convicted of having wilfully sold waste paper at overceiling prices through the device of upgrading, *i. e.*, shipping low grade paper, and invoicing and receiving payment for it at the ceiling prices applicable to higher grades. The Circuit Court of Appeals reversed his conviction, basing its decision on the assumption that one or more of the following practices constituted defenses to the prosecution: (1) the alleged cus-

tom in the trade for the buyer to check the paper on delivery and reject any that was upgraded or negotiate a new agreement with the seller at the lawful ceiling price; (2) the alleged custom of shippers to invoice paper at a high grade but to ship whatever they had on hand even though the grade was lower than the invoice grade; (3) the alleged refunds by respondent of the overcharges on all of the sales involved.

(1) The custom of the buyers to inspect and reject upgraded shipments represents no more than the universal practice of buyers to inspect what they receive and to refuse to pay for something they do not receive. A sale at an overceiling price is not to be regarded as one at the lawful maximum merely because there is the possibility of a subsequent adjustment by the seller.

(2) There is nothing in the record to support the statement of the court below that there was a custom in the trade for shippers to fill cars with whatever merchandise they had regardless of the grade which was ordered and invoiced. In any event, the applicable regulation specifically requires that waste paper be invoiced according to the proper grades; hence any such custom would be expressly forbidden by the regulation and could scarcely be relied upon as a defense.

(3) Once an overceiling sale has been made, a refund of the overcharge constitutes no defense. Furthermore, the record is clear that as to two of

the five sales involved, no refund was ever made. The sentence imposed on defendant did not exceed that allowable for either of those two counts alone. Hence, even on the theory of the court below, the conviction should have been affirmed.

ARGUMENT

THE RECORD SUPPORTS THE JURY FINDING THAT RESPONDENT WILFULLY MADE SALES OF WASTEPAPER AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION 30

Respondent invoiced, delivered, and received payment for paper at a price higher than the ceiling applicable to the grade delivered. As the court below conceded, this, without more, would make defendant's transactions overceiling sales (R. 72). It apparently thought, however, that no overceiling sales occurred because of: (a) the alleged custom in the trade for the buyer to check on delivery, and, when he found the merchandise to be below the invoice grade, either to reject the upgraded merchandise or to negotiate a new arrangement with the "broker" in which the paper would be priced on the basis of the ceiling for the true grade and the "broker" would debit the account of the shipper accordingly; (b) the alleged custom of shippers in the industry to load the freight cars with whatever grades they had, regardless of the grade ordered and invoiced; and (c) the alleged refunds on all the sales (R. 72–73).

It is submitted, however, that none of these grounds affords respondent any defense or in any

respect deprives his sales of their overceiling character. The question whether the prices charged were intended not to be final but to be subject to adjustment was submitted by the trial court to the jury" (R. 66–67). There was ample evidence to support the jury's verdict, as appears both from the Statement and the discussion *infra*.

"* * * In order that there may be a crime here, there must have been an intent on the part of this defendant to commit that crime, which was to receive a price for the paper which he sold which was in excess of the ceiling price. Now, if actually there had been paid to him more than the ceiling price, but it was the intent and intention of all persons respecting it, not to accept * * * that as the final price necessarily, but to accept it subject to adjustment which would be made upon the examination of the paper actually delivered and the establishment of the price set by law for that paper, that is, if they had the idea that the only price to be received was that which the law set for the paper actually delivered, and that actually was what was paid, then there was no intent on his part to break the law. But if he sold this paper to the dealer, the wholesale dealer for a price which was above the ceiling price, and that was the price that he intended to get, and if you find as a fact that the only reason he didn't get it was because he didn't get away with it and there was a discovery without his having intent to do the honest, decent thing, and that was the only reason he didn't get it, still he would have had an intent to commit the crime and would have effectively committed it when he received above-ceiling price which he intended to receive, if he did so intend, and if the only reason that he didn't get the ceiling price was because he was found out.

"In other words, there must be, before you can find him guilty, there must have been in his mind an intention not to set a price and then have it adjusted * * * afterwards according to the truth of the situation, but an intent

(A) *The alleged industry custom of the buyers to inspect and to accept, reject, or renegotiate.*— To the extent that the record shows an industry practice whereby the purchaser inspected the goods and checked the grade on delivery, this represents no more than the custom of any buyer of merchandise to examine his goods on receipt to verify that the seller has delivered what he ordered. And the right to reject any goods that do not conform to his order is a right which a purchaser always has in the absence of specific agreement to the contrary. The right is no different from that exercised by any housewife who refuses to accept goods delivered by a department store which are wholly different in type from those ordered. Nor is this situation any different from that in which the weight of goods sent is short and the purchaser is unwilling to pay more than the proper price for the quantity actually sent. The purchaser and seller always have the right

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to commit the crime, the formation of a purpose in his mind when he did this thing, to get more money for that paper than the ceiling price established by law.

"I hope you understand what I mean, because there has been in the defense set up the thought that he did charge the price which was set for something which actually was not delivered, but that the terms of the contract were that if there was any variation, there would then be a revision; and he says that he shipped with that intention, and that he didn't actually himself know what was shipped, but gave orders to his people to deliver what was ordered. Now, you just delve into that from the evidence and consider only the evidence brought out at this trial, and arrive at your determination. * * *"

to agree to a new contract, under which the goods would be retained and only the proper price for what was actually sent paid. Thus, if there was an industry understanding authorizing this practice of acceptance, rejection or renegotiation, it constituted no more than a reflection of the legal rights which all of the parties possessed without any such understanding, and did not alter the nature of the transaction for purposes of the Price Control Act. If an industry understanding, conferring the same rights upon the purchaser as he would have had under the law of sales and without regard to the understanding, can exempt the seller from liability for overceiling sales, such an understanding would be a valid defense in every case where goods are invoiced at prices above the ceiling price.

Thus it cannot be contended that this right of the purchaser (whether based upon an expressly recognized industry custom or upon the privilege possessed by all buyers under the law of sales) implies that all sales of any merchandise *at a specified price* are to be regarded as sales not at that price but at some price which may be determined in the future, depending on the buyer's inspection. The sale is a sale at the initially agreed price, notwithstanding any subsequent adjustment by the seller.[16] This has been held to be

[16] Under the Emergency Price Control Act, "sale" includes "sales, dispositions, exchanges • • • and contracts and offers to do any of the foregoing." (Section 302 (a).)

Even under the common law definition of "sale", title

true even where no overceiling payment by the buyer has preceded a voluntary adjustment. *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C. C. A. 9), petition for certiorari pending, No. 161, this Term.

Even if the buyer had the right to pay on the basis of the actual grade shipped without either any further negotiations or the consent to payment of the lower price by the shipper, the sale would nevertheless have been at an overceiling price. In *United States* v. *Seidmon*, 154 F. 2d 228 (C. C. A. 7), a shipper was held guilty of criminal contempt of an injunction forbidding him from selling, delivering, or offering for sale, scrap iron at overceiling prices, where the evidence showed that he had shipped scrap invoiced at the ceiling for a higher grade. This was held despite the fact that there was a custom in the trade authorizing the purchaser to regrade the shipments and pay only the price for the grades actually

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passed when the paper was shipped. See the terms of Carrano's purchase order (R. 70), indicating a "purchase" at the time of shipment "subject to mill or consignee's report as to weight, quality, excess freights, etc." Cf. *Delaware, Lackawanna & Western Railroad Co.* v. *United States*, 231 U. S. 363, 371–373. See also Uniform Sales Act, Sec. 19; *Standard Casing Co.* v. *California Casing Co.*, 233 N. Y. 413, 416, *Atlas Shoe Co.* v. *Lewis*, 202 N. Y. App. Div. 244, 248. Hence the argument can scarcely be made that a completed sale had not taken place until all final adjustments in price had been made and that therefore all final adjustments had to be taken into account to determine whether there was in fact an overceiling sale. Cf. *Leonard* v. *Davis*, 1 Black 476, 482–483; *Boswell* v. *Green*, 25 N. J. L. 390, 397–399.

shipped, without the consent of the shipper, and despite the fact that, as to the particular violations complained of, the purchaser had exercised this right and the defendant had never received more than the ceiling price. The case at bar is a far stronger one, for (1) there was no arrangement here whereby the purchaser could scale down the prices to ceiling level without the consent of the seller (R. 11), and also because (2) overceiling prices had already been paid by Carranto to Bruno (R. 6–9, 44–45, 54–55).

In agreement with the *Seidmon* case above are the remarks of Judge Koscinski in *Bowles* v. *Soverinsky*, 65 F. Supp. 808 (E. D. Mich.), in which injunctive relief was sought on the basis of upgrading in the sale of waste rags in violation of Maximum Price Regulation 47 (8 F. R. 270): "Defendants attempt to avoid the injunctive relief requested by plaintiff by reliance on a claimed custom of the industry to the effect that all shipments are sold 'subject to mill-grading' and that their action in this case was but an offer to sell the goods as of whatever grades the mill declared them to be. None the less, this procedure is a patent evasion of the unmistakable provisions of the regulation. Scarcity of waste materials has a tendency to encourage the kind of dealings here complained of and it is easily conceivable that a consumer would be willing to pay the up-graded price rather than close down his mill for a lack of those materials" (65 F. Supp. at 812).

Indeed, we know of no case in agreement with the reasoning of the court below. The issue has rarely been specifically discussed, though the buyers' custom referred to by the court below has been asserted in many of the enforcement suits which have been brought against upgrading. Courts have thus far been unwilling to determine that upgrading—a favored device of the black market—may be used with impunity wherever buyers in the industry customarily check the grade of the goods delivered, and either reject upgraded shipments or receive price adjustments on them. Such a determination would give a legal green light to upgrading. Few sellers would hesitate to take advantage of a situation where they have all to gain and nothing to lose. The minimum the upgrading seller would retain in all cases would be the legal maximum price, and, in many cases, he would get more; in a seller's market, buyers certainly will not always reject upgraded shipments or insist upon price adjustments.

It should be emphasized, finally, that, as hitherto indicated, the sales were not made at an "open" price—to be determined in the future, depending on the buyer's inspection of the grade. On the contrary, they were made at specific invoice prices which were concededly above the ceiling, and the goods were delivered at those prices. Nor did the buyer have a right, either by contract or custom (R. 73, 11), to decrease this

specified price, without the seller's consent, to the ceiling price for the grade actually delivered. Respondent's clear violations of the prohibitions of the Regulation against sale or delivery at overceiling prices were unaffected by an industry custom under which buyers exercised their normal right to inspect the goods bought and reject them as below the quality contracted for, or keep them if the seller agreed to a different price for the different quality.

(B) *The alleged custom of the shippers to ship whatever grade they had on hand regardless of the grade ordered and invoiced.*—The court below stated that there was "testimony that in times like the present, with paper very scarce, the shipper would customarily fill up the car with whatever he had, on the assumption, as proved by experience, that the factories were very glad to have any kind of paper they could get" (R. 73).

There is nothing in the record which supports this statement, with the problematical exception of the defendant's testimony that he upgraded his cars (R. 42, 43, 44); even if assumed to be true, this would not show a practice for the rest of the industry. Testimony that the purchasing mills had a practice of inspecting and rejecting upgraded merchandise is not, of course, equivalent to testimony that shippers customarily shipped upgraded paper. The existence of any such practice of upgrading is contradicted by the only pertinent evidence in the record, Carrano's testimony that he had no arrangement with respondent

whereby the latter could bill merchandise as Assorted Kraft but ship inferior grades (R. 55). Furthermore, the "broker" customarily specified particular grades in his order (R. 9), a meaningless gesture if he expected random loading; and Bruno admittedly knew that Carrano wanted what he specified (R. 48).

Even if there were an industry practice of loading low grade paper and invoicing for a higher grade, it would constitute no defense, for such false grading in the invoice would have been in direct violation of the clear mandate of the regulation, which requires correct invoicing and sales and deliveries at no more than ceiling prices. See Sec. 1347.14 (f) and Sec. 1347.1 (a) of Maximum Price Regulation No. 30, *infra*, pp. 25–26, 24." Certainly respondent could gain no comfort from a custom which in itself was unlawful. If that were not so an industry in which blackmarketing were sufficiently prevalent would by reason of that fact alone be immune from prosecution—an obviously absurd result.

(C) *The alleged refunds on all the sales.*—The opinion below was predicated upon the assumption that all over-payments were adjusted (after the commencement of the OPA investigation),

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[11] The provisions of this regulation require that the sales of waste paper be properly invoiced and the invoices kept on file. Sections 4 (a) and 205 (b) of the Act make it unlawful for anyone to make false statements in any document required to be kept or filed.

with the result that respondent ultimately received no more than the ceiling price (R. 73–74). This was both incorrect and immaterial.

1. *Refunds were not made on two of the five violative sales.*—The refund or "debit" was made only as to three of the five carloads involved. No refund was ever requested or obtained in connection with the other two carloads. The accountant for the Taggart Corporation testified with respect to the three shipments received by that company (R. 27):

> Q. With respect to three shipments, your attention has been called to, there was only one shipment where a debit was engaged in?—A. Yes.
>
> Q. And the other two were paid in full?—A. Right.
>
> Q. And no adjustment has ever been made on them?—A. No.

(See also R. 28.) And the respondent testified that he made adjustments only when the mills reported the upgrading to Carrano for adjustment and the latter passed the report on to the respondent (R. 42). While the respondent testified generally that adjustments were made in all cases of upgrading (R. 44, 45), he could not show from his accounts or any exhibits that such refunds had ever been made; his recollection on the subject was quite vague (R. 45–47). Indeed, counsel for the respondent, in his motion for a directed verdict, in effect conceded that there was no evidence of a

refund with respect to two of the shipments to the Taggart Corporation (R. 61). In this state of the evidence the court below was not justified in holding that the evidence was clear that the ultimate price paid was not more than the ceiling;[12] the point was submitted to the jury and there was ample evidence to support its verdict to the contrary."[13]

Thus, even on the theory of the court below, these two sales were unlawful. More than the ceiling price was paid and no portion of the excess was ever paid back to the purchaser. In other words, even if all of the Government's arguments up to this point are incorrect, nevertheless, as to two of the five counts of the information, it was

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[12] The court below must have overlooked the above-quoted testimony when it stated (R. 73): "Both the representatives of the consignees who have testified and Carrano, the broker, were clear and explicit in their statements that the ultimate price paid was not more than ceiling." Although Carrano first stated generally that adjustments were made after mill inspection (R. 10–12), he only identified three "debit memos" covering three of the carloads involved in this case (R. 11). When Carrano was recalled to the witness stand and his attention specifically directed to the other two carloads, he admitted that in the absence of his records (which he had been requested to bring to court (R. 56)) he could not answer as to whether adjustments had been made (R. 56–57). The court below apparently also overlooked the latter portion of Carrano's testimony.

[13] The jury was instructed (R. 62) that if the respondent "did not sell it with intent of receiving higher than ceiling price, and *did not actually receive higher than ceiling price*, there could be no conviction". (Italics supplied). As to instances where debits were made the jury was told to pass on the Government's contention that this "was just an afterthought" (R. 62).

clearly error for the court below to reverse the conviction. Since the sentence imposed on respondent (R. 1) was not in excess of that allowable for either of these two counts,[14] then, even on the reasoning of the court below, the conviction and sentence should have been affirmed. *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Brooks* v. *United States*, 267 U. S. 432, 441; *Abrams* v. *United States*, 250 U. S. 616, 619; *Evans* v. *United States*, 153 U. S. 584, 595; *Claassen* v. *United States*, 142 U. S. 140, 146.

2. *Refunds would not be a defense to the violation.*—Once an overceiling sale has been consummated, especially where, as in the instant case, payment has been made as well, the seller has no *locus poenitentiae* in which to purge himself of his violation by refunding the excessive portion of the purchase price, any more than one guilty of larceny can escape punishment by returning the property he has stolen. *Gilbert* v. *Thierry*, 58 F. Supp. 235 (D. Mass.), affirmed, 147 F. 2d 603 (C. C. A. 1); *Bowles* v. *Leventhal*, 61 F. Supp. 144 (S. D. N. Y.); *Bowles* v. *Lehigh Valley Coal Sales Co.* (S. D. N. Y.), 4 OPA Op. & Dec. 2185; *Trachtman* v. *Samit*, 62 F. Supp. 176 (E. D. Pa.); *Zwang* v. *A & P Stores*, 181 Misc. 376, 46 N. Y. S. 2d 747; *United States* v. *Summerford* (D. Hawaii), 1 OPA Op & Dec. 1247. Thus, even if the court below had been correct in stating that the evidence

[14] See Sec. 205 (b) of the Act, Appendix, *infra*, pp. 23–24.

was "clear and explicit * * * that the ultimate price paid was no more than the ceiling," that fact would not have constituted a defense to the prosecution.

CONCLUSION

The judgment of the court below was erroneous; it should be reversed, and the judgment and sentence of the district court reinstated.

Respectfully submitted.

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SEPTEMBER 1946.

APPENDIX

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. App., Supp. V, 901, *et seq.*, are as follows:

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 205 (b). Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punish-

ment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

* * * * *

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

The pertinent provisions of Maximum Price Regulation No. 30, which establishes maximum prices for wastepaper, as it existed at the time of the transactions involved (7 F. R. 9732, 8 F. R. 13049, 8 F. R. 17483) are as follows:

§ 1347.1 PROHIBITIONS.—Regardless of any contract, agreement, lease or other obligation:

(a) No person shall sell or deliver any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(b) No person shall buy or receive any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(c) No person shall agree, offer, solicit, or attempt to do any of the foregoing.

* * * * *

§ 1347.8 EVASION.—The price limitations set forth in this Maximum Price Regulation No. 30 shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation,

agreement, sale, delivery, purchase or receipt of wastepaper, alone or in conjunction with or relating to any other commodity or by way of commission, service, transportation, or other charge, or discount, premium or other privilege or tying agreement, or other trade understanding or otherwise.

§ 1347.9 ENFORCEMENT.—(a) Persons violating any provision of this Maximum Price Regulation No. 30 are subject to the criminal penalties, civil enforcement actions, license suspension proceedings, and suits for treble damages provided for by the Emergency Price Control Act of 1942 as amended.

* * * * *

§ 1347.11 (b). Unless the context otherwise requires, the definitions set forth in section 302 of the Emergency Price Control Act of 1942 shall apply to other terms[1] used herein.

* * * * *

§ 1347.14 APPENDIX A: MAXIMUM PRICES FOR WASTEPAPER. * * *

(f) *Invoice requirements.*—All sales of wastepaper commercially packed shall be invoiced. When delivery of the wastepaper is out of seller's warehouse, the invoice shall accompany the delivery or be mailed to purchaser before the end of the business day following the day upon which the wastepaper is shipped. In all other cases, the invoice shall be mailed before the end of the business day following the day upon which the wastepaper is shipped except that in those cases where seller does not receive

[1] The terms specifically defined in paragraph (a) of this section are not here pertinent.

the description of the wastepaper from his own supplier within that time, he shall send the invoice to purchaser as soon as he does receive that description. A copy of such invoice shall be kept on file by the seller, and the original shall be kept on file by the purchaser. The invoice shall state as separate items the following data:

(1) *The grade name.*—This shall be (i) the applicable grade name set forth in paragraph (a) of this § 1347.14, or (ii) the grade name of a specialty with respect to which sworn statements and samples have been submitted to the Office of Price Administration in accordance with paragraph (c) of this § 1347.14.

(2) *The origin of the shipment.*—This shall include the name of the city or town where the point of shipment is located. If delivery is in the seller's own truck, and if the point of shipment and the buyer's premises are located at a distance of more than ten but less than fifteen miles from each other by the shortest available highway route, the street address and city where such point of shipment is located shall be shown.

(3) *The destination of the shipment.*—This shall include the name, street address and city of the consumer.

(4) Any amount charged by the seller for transportation of the wastepaper.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 67

UNITED STATES OF AMERICA,
Petitioner,

vs.

LOUIS BRUNO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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Opinion Below.

The opinion of the circuit court of appeals is not yet reported. (See however pages following R. 114a.)

Jurisdiction.

The judgment of the circuit court of appeals was entered on February 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether a jury can find a seller of a commodity under price control guilty of a criminal violation where he invoices goods at and over ceiling price by improperly describing the commodities grade, if the purchaser has a right to inspect shipments and pay for the same if accepted at the ceiling price as determined by the purchaser.

2. Whether a custom of sellers to invoice goods in accordance with orders though the goods shipped are not in accordance with the invoice but where the purchaser has the right to inspect the goods and is only required to pay for the same at ceiling price in accordance with their determination of the quality and quantity is sufficient to support a conviction of selling goods at above ceiling prices.

Statute and Regulations Involved.

The statute and regulations involved are the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. Sec. 901 *et seq.*), as amended, and Maximum Price Regulations No. 30 (7 F. R. 9732) issued under Section 2 (a) of that Act.

Statement.

An information was filed in the District Court for the District of New Jersey against the defendant, Louis Bruno, charging him in five counts with violations of the regulations promulgated by the Price Administrator under the Emergency Price Control Act of 1942 in that allegedly he made five separate sales and deliveries of waste paper at prices above the maximum price he was permitted to charge for the type of paper sold (R. 2a-6a).

After a jury trial respondent was convicted and sentenced to imprisonment for a term of six months and to pay a fine of $500.00 (R. 1a). On appeal to the Circuit Court of Appeals for the Third Circuit, the judgment of conviction was set aside.

The evidence offered at the trial showed that Louis Bruno received orders from a broker named Carrano to ship waste paper to two different mills. The orders received from Carrano contained the following provision: "The above merchandise is purchased subject to mill or consignee's report as to weight, quality, excess freight, etc." (R. 16a). The orders received by Carrano from the mills and which were the cause for the orders he gave to Bruno contained the fol-

lowing condition: "All materials will be subject to our inspection and approval, and if rejected, same will be held subject to your order and risk and at your expense" (R. 17a).

Bruno would after receiving the orders give instructions to the girl in the office of T. Bruno Paper Stock Company to have the orders filled from the warehouse (R. 68a). It was the practice of this company in event they did not have enough of the grade of paper called for in the order to fill the car with anything they had in the warehouse and ship it out depending upon the mill inspection for a determination as to the quality and quantity (R. 67a).

No matter how the goods might be invoiced in the final analysis the company for which Bruno worked would only be paid the ceiling price of the goods received by the mill (R. 20a).

In all of the transactions involved in the various counts of the information in the end the defendant did not receive one cent over the ceiling price.

ARGUMENT.

1. The government first contends that the decision if allowed to stand will impede the enforcement program. Nothing could be further from the truth. There was no evidence offered at the trial of the case to support the verdict. The law of this land has always been that a man is innocent until proven guilty beyond a reasonable doubt. The government at best had nothing but suspicion and conjecture upon which to predicate its action and this does not justify taking

the position that courts should not reverse cases if the original decision is in the governments favor.

a. It is secondly contended that the opinion in some remote aspect is in conflict with *United States ex rel. Bowels* v. *Leonard Seidmon,* decided by the Circuit Court of Appeals for the Seventh Circuit on March 19, 1946.

There is no conflict between the decisions in these two cases. One case involves the violation of the terms of a specific injunction whereas the other is a case charging a defendant with the wilful and unlawful sale of goods at above ceiling prices. The facts and questions involved are in no way related or similar.

b. The next point raised is that the defendant is guilty of the charge contained in the information because he violated some other regulation. This contention cannot stand.

In a criminal case one can only be convicted if he is shown to have violated the statute or regulation charged in the information. Proof of some other violation, and it is not conceded that there is any such proof in the instant case, is not proof of the crime charged.

2. It is true as contended by the government in its second point that it is the function of a jury and not of the appellate court to find facts. However when, as is the situation in the instant case there was no evidence to submit to the jury and the trial court erred in denying defendant's motions for a directed verdict the Circuit Court acted properly in reversing the conviction.

3. There is nothing in the record to support the government's third point as the record (R. 20a) clearly shows by

the testimony of the government's own witness that Bruno did not receive more than the ceiling price for any of the shipments complained of.

Conclusion.

The decision below is correct. There is no conflict of decisions nor any other reason for further review. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

GEORGE R. SOMMER,
Attorney for Louis Bruno.

May, 1946.

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CLERK

IN THE

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OCTOBER TERM, 1946.

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UNITED STATES OF AMERICA,
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vs.

LOUIS BRUNO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT, BRUNO.

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October, 1946.

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IN THE

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OCTOBER TERM, 1946.

No. 67

UNITED STATES OF AMERICA, Petitioner, *vs.* LOUIS BRUNO.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, BRUNO.

Opinion Below.

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals (R. 71-74) has been reported in 153 F. 2d 843.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 15, 1946 (R. 75). The petition for a writ of certiorari was filed on March 23, 1946, and was granted on May 13, 1946 (R. 76). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

Questions Presented.

1. Whether the Circuit Court of Appeals erred in reversing a conviction where there was no evidence to support the same.

2. Whether the invoicing of goods at a price higher than the ceiling, where the consignee is only to pay the ceiling price according to his inspection, is a wilful violation of the Emergency Price Control Act.

3. Whether a jury can find a seller of a commodity under price control guilty of a criminal violation where he wilfully sells at an over-ceiling price by falsely describing the commodity's grade, if the purchaser has a right to inspect shipments and reject any that are upgraded or by consent of the seller pay for them on the basis of their true grade.

4. Whether there was a custom in the trade for sellers to invoice goods at grades higher than those actually shipped.

5. Whether, if so, such a custom constitutes a defense when the custom itself is in violation of the Emergency Price Control Act.

6. Whether respondent repaid the amounts overcharged on all of the shipments covered by the information.

7. Whether, if so, such payment constitutes a defense.

Statute and Regulations Involved.

The statutes and regulations involved are the Emergency Price Control Act of 1942 and Maximum Price Regulation 30. The pertinent provisions thereof are set forth in the Appendix to the Government's brief, pp. 23-26.

Statement.

A criminal information was filed against respondent, Louis Bruno, for having sold waste paper at prices higher than the ceiling established by Maximum Price Regulation 30. Five separate sales of a carload each were the basis for as many counts in the information (R. 2-4.). The jury found respondent guilty of all five counts. He was sentenced to six months imprisonment and a fine of $500.00 (R. 1).

The judgment of conviction was reversed by the Circuit Court of Appeals for the Third Circuit (R. 75) to which court this court has issued a writ of certiorari. (R. 76).

James Carrano Sons Inc., received orders from Ohio Box Board Company and Taggart Corporation for waste paper and gave orders to T. Bruno Paper Stock Company for the same with instructions to ship the waste paper directly to the mills of the aforementioned companies. Carrano was a broker and carried on its business by obtaining orders from mills and then placing orders with dealers to ship directly to Carrano's customers. The dealers billed Carrano who paid them and Carrano in turn billed the mills for the paper shipped. Carrano gave respondent orders

for over eighteen carloads of various types of waste paper (R. 38, 39, 70).

Respondent invoiced the shipments which were the subject matter of the information as No. 1 assorted kraft paper and charged $1.75 per hundred weight the ceiling price therefor. Pursuant to Carrano's directions two of the carloads which are the subject matter of the information, were sent to Ohio Box Board Company, and three of them to the Taggart Corporation (R. 6-8).

Inspection at the mills of Ohio Box Board Company revealed the shipments referred to in the first count of the information contained 2,005 pounds of mixed paper, 25,979 pounds of corrugated, and 6,735 pounds of kraft (R. 18), and the shipment referred to in the second count of the information contained 24,040 pounds of corrugated and 485 pounds of kraft (R. 18).

Inspection at the mill of Taggart Company revealed the shipment referred to in the 4th count of the information contained corrugated paper which was a different type of paper than that referred to in the invoice (R. 21-22).

Insofar as the shipments referred to in counts 3 and 5 of the information are concerned, though the cars were inspected at the mill there was never any report of variation between the invoice and the actual contents of the cars (R. 28).

The orders from the mills to Carrano contained a provision to the effect that all materials were subject to mill inspection and approval and that if not as invoiced would be held subject to the shippers order and risk and at the shippers expense (R. 10).

The orders from Carrano to Bruno were upon the following condition: "The above merchandise is purchased subject to mill or consignees report as to weight, quality, excess freights etc."

In addition to the provisions of the orders it was a custom of the trade for the mills to pay for goods only in accordance with their inspection regardless of how they were invoiced (R. 10).

In regard to the cars mentioned in counts one and two, Ohio finding the contents different from the invoice paid Carrano in accordance with its findings on inspection.

In regard to the cars mentioned in counts three, four and five, Taggart finding the contents of the car referred to in the fourth count different from the invoice paid in accordance with its findings on inspection. There being nothing to show that the contents of the cars referred to in counts three and five of the information were different from the description in the invoice (R. 28) it paid Carrano in accordance with the invoice.

As between Carrano and Bruno it was their practice for Bruno to ship the goods to the mills and upon shipment to send an invoice to Carrano. Carrano would pay Bruno the invoice. Upon receiving the mill report he would communicate with Bruno, who would accept the mill report. When Carrano was paid by the mill less money than Bruno's invoice he would send Bruno a debit memo and then deduct the amount thereof from his next check to Bruno.

In the instances covered by the information, debit memos were issued covering the cars referred to in counts one, two and four (R. 68-69).

The price to be paid Bruno was to be the ceiling price of the goods received by the mills in accordance with their inspection.

When the transactions covered by the information were complete Bruno did not receive one cent above the ceiling price for the goods he shipped to Ohio and Taggart (R. 12 and 19).

In connection with the foregoing statement of facts it is important to bear in mind that Bruno never knew exactly what the cars actually contained. Bruno neither loaded the cars nor was he present when the cars were loaded (R. 42-45).

He would instruct employees of T. Bruno Paper Stock Company to fill the cars in accordance with the orders and with the further instructions that if they did not have sufficient paper of the quality called for to make a car to fill it with what ever was on hand (R. 42). This was done not only because the mills could use any kind of paper but also to comply with O. D. T. regulations. The cars would be filled in accordance with these instructions and he would receive a report of the total weight without any break down (R. 43). He would then invoice the car in accordance with the order knowing that it would be inspected at the mill and he would be paid the ceiling price based on the mills findings as to quality and quantity.

Only on two occasions was there a break down on the invoice and this was because of the fact that a specific load which had been weighed separately was included in the car (R. 51).

The jury convicted on all five counts (R. 1). The Circuit Court of Apepals overturned the jury's verdict and held that no criminal violation had been established (R. 74).

Summary of Argument.

I. There was no evidence to support the jury finding that respondent willfully made sales of waste paper at prices higher than the maximum prices permitted by Maximum Price Regulations 30.

II. The decision of the Circuit Court was a proper determination of the issue.

ARGUMENT.

The decision of the Circuit Court was correct because of the fact that there was no evidence to support the jury's verdict.

Each count of the information upon which the respondent was convicted alleges that respondent did wilfully and unlawfully demand and receive a sum in excess of the maximum price fixed by law for the commodities sold. In order that the conviction might stand the Government must have proven that respondent demanded and received these sums wilfully, that is, knowing that the amounts received were above the ceiling prices set by the Office of Price Administration.

We submit that the Government did not produce any evidence that the respondent demanded or received any

sum above the ceiling price for the merchandise sold and that there was no wilful violation of the law.

The evidence in the case showed that various mills ordered from J. Carrano & Sons various types of waste paper and agreed to pay J. Carrano & Sons, who were brokers, the ceiling price for the paper. These orders, however, contained a condition that all purchases were subject to mill inspection as to quality and quantity of paper received at the mill. Carrano then in turn sent out orders, to dealers, for the paper required by the mills. Among those that Carrano ordered paper from was the T. Bruno Paper Stock Co., of which company respondent, Louis Bruno, was the manager. (R. 38, 39).

The orders sent out by Carrano provided that he would pay the ceiling price for the paper but that all shipments were subject to mill inspection as to quality and quantity. (R. 10, 70).

The evidence further showed that it was a custom of the trade for dealers to ship paper to the mills on Carrano's order and to bill Carrano for the paper in accordance with the order regardless of the type of paper actually shipped. Carrano would then pay these invoices. The paper would be received at the mills, inspected by them, and upon their determining the quality and quantity of paper they would in turn pay Carrano the ceiling price for the same and Carrano upon receiving the mill report, if it varied from the invoice, would debit or credit the dealer on his next check the amount shown by the mill report to have been over or under paid originally. This procedure was followed in connection with all sales made by Bruno to Carrano.

Bruno after receiving the orders from Carano would instruct his employees to fill the cars with Kraft paper and ship them out. His further instructions to his employees were that if there was not sufficient Kraft paper on hand to fill a car they were to fill it with any other paper on hand and then ship it. O. D. T. regulations require that all space in cars be filled. Bruno was never present when the cars were loaded and had no actual knowledge of their contents but when the weights were reported to him he would invoice the goods as Kraft regardless of the actual contents of the cars, knowing that he would in the final analysis only be paid the ceiling price in accordance with the mills determination as to quality and quantity of the merchandise received.

Carrano testified that the entire procedure above outlined was a practice of the trade which had been followed and grown up over a course of years, and that in no instance did he pay Bruno anything above the ceiling price for merchandise which he purchased from him (R. 12).

In all of this Carrano was corroborated by the representatives of the mills who were called to the stand.

Nowhere in the testimony in this case can there be found any evidence to contradict the statements of the Government's witnesses to the effect that Bruno was not paid above the ceiling price for the merchandise which he shipped or that he had demanded or expected to receive any sum over the ceiling price.

It was the contention of the Government that because of the fact some of the debit memos were sent out after agents of the Office of Price Administration had inspected

some of the cars, and found that their contents was not the same as the invoice, that these circumstances were sufficient to justify the case going to the jury.

It further contends that the entries in the Bruno books together with respondent's explanation justified the case going to the jury.

These two situation might create certain suspicions in the mind of some people but they go no further than that.

A conviction cannot be sustained on suspicion or mere possibilities. Had the witnesses who had personal knowledge of all of the facts and circumstances not been placed on the witness stand, there might be some room for suspicion or surmise. However, the Government itself, in this instance, proved that nothing wrong was done.

A mere scintilla of evidence or suspicion is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule, namely, that in every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of prof is imposed.

Gunning vs. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

It is the duty of the Government in any case to establish the guilt of the accused. It is the duty of the court to direct a verdict if no substantial proof of guilt is offered. When the proof rests on circumstances which lead as rationally

to the conclusion of innocence as of guilt, there is no proof of guilt and nothing to go to the jury.

Juries are not permitted in civil cases to speculate as to the negligence of a defendant. (*Atchison T. & S. Ry. Co.* vs. *Toops*, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896). They should not be permitted to guess at the guilt of a defendant in a criminal case.

Leslie vs. *United States*, 43 F. 2d 288.

It was admitted by the respondent that the goods shipped were not in accordance with the invoice, however, it was his understanding, it was the custom of the trade, it was his agreement and it was one of the conditions of the orders that regardless of the contents of the cars payment would only be made at ceiling price in accordance with the findings of the mill.

In view of all of these things, the mere fact that agents found that three cars did not contain the merchandise called for by the invoice does not make that circumstance inconsistent with innocence.

It must be borne in mind that the mill had not inspected the cars when the agents arrived and that the inspection was made jointly by the agent and a representative of the mill. It certainly cannot be spelled out from the evidence produced that the mill would have made a different determination if the agents were not present.

To sustain a conviction on circumstantial evidence it must not only have been consistent with the defendant's guilt but it must have been inconsistent with his innocence. Such is not the case here.

Tingle vs. *United States*, 38 F. 2d. 573;
Langer vs. *United States*, 76 F. 2d 817;
Ribaste vs. *United States*, 44 F. 2d 21;
Gold vs. *United States*, 36 F. 2d 16.

The government further contends first that refunds were not made on two of the cars and secondly that refunds would not be a defense to a violation.

The evidence clearly shows that insofar as the cars involved in counts one, two and four are concerned, refunds were made by means of credit memos, (R. 68, 69), and the deduction of the amount thereof from subsequent checks sent by Carrano to Bruno in payment for other goods.

Insofar as the cars mentioned in counts three and five were concerned there was no refund made because the cars apparently contained the same merchandise as called for in the invoice.

The accounting office of Taggart never received any report that these cars contained goods different from the invoice (R. 28) and if they had an adjustment would have been made.

There were eighteen carloads of paper shipped by Bruno to Taggart. (R. 38, 39). The government showed its witness a group of freight reports covering shipments by Bruno to Taggart but these reports were never put in evidence (R. 59, 60, 61) and there was nothing to show that the reports shown the witness covered the cars in question.

There being nothing to show that the cars did not contain the goods called for in the invoice there would of course be no refund to be made and there was no violation.

Even if the contents of these two cars was different from the invoice and more was paid than Bruno should have received it would not make the transaction a violation of the law for it would have been, in view of the agreement between the parties and the trade custom nothing more than an error in bookkeeping or accounting and certainly not a wilful violation.

There is no argument against the government's other contention that where there has been a wilful sale above the ceiling a refund at a later time is no defense to the violation,

In order however to have this statement of law apply to the instant case one must first assume that there was a wilful violation.

In order to do this one must totally disregard the testimony not only of the defendant but of the government witnesses as well as the agreements between the parties, the custom of the trade, the provisions of the orders and all of the evidence.

The evidence in the case was clear and explicit that the sales were not to be completed transactions until such time as the mills had examined the merchandise and paid for it at the ceiling price according to the mills determination as to the quality and quantity of the merchandise.

This procedure might be in violation of some other regulation, though this is not conceded, it does not prove the charge contained in the various counts of the information.

The proof adduced at the trial clearly and conclusively showed that the respondent never expected to receive anything above the ceiling for the merchandise and that there was not a wilful violation of the law.

Conclusion.

For these reasons it is respectfully submitted that the judgment of the Court below should be affirmed.

GEORGE R. SOMMER,
Attorney of Respondent, Louis Bruno.

October 1946.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1946.

The United States of America, Petitioner, v. Louis Bruno.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 9, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

A criminal information was brought against Bruno for having wilfully sold[1] waste paper at prices higher than the ceilings established by Maximum Price Regulation 30.[2] The information contained five counts, each count charging a sale of a carload lot in 1944 at prices above the established ceilings. The jury found Bruno guilty on all five counts. He was sentenced to imprisonment for six months and fined $500. The judgment of conviction was reversed by the Circuit Court of Appeals. 153 F. 2d 843. The case is here on a petition for a writ of certiorari which we granted because of an asserted conflict in principle between the decision below and *United States* v. *Seidmon*, 154 F. 2d 228, in the Seventh Circuit Court of Appeals.

Bruno was in charge of a business, owned by a relative, which bought and sold waste paper. Carrano was a middleman who bought waste paper from Bruno on orders from Carrano's customers. The paper was shipped by Bruno direct to the customers, Carrano paying Bruno the price.

In each of the five sales challenged here Carrano ordered from Bruno a grade of paper known as No. 1 assorted kraft. In each Bruno invoiced the shipment as such and charged the ceiling price for that grade of waste paper. Carrano

[1] Section 205 (b), Emergency Price Control Act of 1942, 56 Stat. 23, 33, 50 U. S. C. App. Supp. III § 925 (b).

[2] See 7 Fed. Reg. 9732, 8 Fed. Reg. 13049, 17483.

paid Bruno the invoice price. It appears that the orders were subject to inspection and approval of the waste paper by the customers; that they customarily made the inspections on receipt of the shipments; and that if the paper was below the grade at which it had been invoiced, the customers would pay Carrano the lower ceiling price, Carrano debiting Bruno with the difference. Each of the five shipments in question was inspected by the customer on its arrival. It was discovered that each shipment was largely composed of corrugated paper, a grade carrying a lower ceiling price. In three cases the customers paid Carrano only for the quality of waste paper received. Carrano thereupon debited Bruno with the difference. In two cases the customer did not complain of the upgrading and Bruno retained the over-charges.[3] Moreover, the debits to Bruno in the three instances mentioned followed on the heels of an investigation by the Office of Price Administration. It also appears that the debits were not shown on Bruno's books. His ledger showed sales, not at the invoice price, but at lower prices. The concealed amounts were explained by Bruno as constituting his commissions on the sales.

The District Court charged the jury that "before you can find him guilty, there must have been in his mind an intention not to set a price and then have it adjusted afterwards according to the truth of the situation, but an intent to fix this price and charge it and get away with it—an intent to commit the crime, the formation of a purpose in his mind when he did this thing, to get more money for that paper than the ceiling price established by law."[4]

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[3] The Circuit Court of Appeals seemed to proceed on the assumption, that in no instance did the ultimate price which was paid exceed the ceiling price.

[4] The preceding part of the charge was:

"In order that there may be a crime here, there must have been an intent on the part of this defendant to commit that crime,

The court also charged that there could be no conviction if Bruno did not sell the waste paper "with the intent of receiving higher than ceiling price, and did not actually receive higher than ceiling price".

We think it was proper to submit the case to the jury. The evidence seems to us ample to support the conviction. There was false grading in each invoice. The sales were not made at a price to be determined on the customers' inspection of the grade. They were made at specific invoice prices which were above the ceiling. The goods were delivered at those prices; and those were the prices actually paid. In some instances there was a subsequent adjustment of the price to conform to the price ceiling for the grade actually shipped. But in others there was not. And bearing on the integrity of the system were two other facts—(1) the debits made followed the OPA investigation; (2) the inflated prices were not disclosed on Bruno's books. In a seller's market upgrading may be a convenient device for black market operations. As the Circuit Court of Appeals noted, when paper is scarce the seller

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which was to receive a price for the paper which he sold which was in excess of the ceiling price. Now, if actually there had been paid to him more than the ceiling price, but it was the intent and intention of all persons respecting it, not to accept that as the final price necessarily, but to accept it subject to adjustment which would be made upon the examination of the paper actually delivered and the establishment of the price set by law for that paper, that is, if they had the idea that the only price to be received was that which the law set for the paper actually delivered, and that actually was what was paid, then there was no intent on his part to break the law. But if he sold this paper to the dealer, the wholesale dealer for a price which was above the ceiling price, and that was the price that he intended to get, and if you find as a fact that the only reason he didn't get it was because he didn't get away with it and there was a discovery without his having intent to do the honest decent thing, and that was the only reason he didn't get it, still he would have had an intent to commit the crime and would have effectively committed it when he received above-ceiling price which he intended to receive, if he did so intend, and if the only reason that he didn't get the ceiling price was because he was found out."

may send not what is ordered but what he has, on the assumption that manufacturers will be glad to take any kind of paper they can get. In view of the inadequacy of the supply, buyers cannot always be expected to reject upgraded shipments or insist upon price adjustments. The facts of this case sustain that theory, for in two instances no price adjustment was sought or made. In view of all the circumstances, the jury could well conclude that the system adopted by Bruno was designed to bring him more for the goods than was lawful.

Reversed.